Supreme Court, U.S.
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No. 98-

IN THE SUPREME COURT OF THE UNITED STATES

JESSIE TOMPKINS, *et al.*

Petitioners,

v.

ALABAMA STATE UNIVERSITY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a court in a class action lawsuit alleging discrimination has sanctioned a "remedy" of a whites-only scholarship at a historically black state university, can African-American students precluded from obtaining such scholarships bring a separate lawsuit claiming that their Equal Protection rights have been violated by those whites-only scholarships?

2. Where the class in a certified class action includes, inter alia, "all black citizens of the State of Alabama," can alleged class members file a separate lawsuit challenging the institution of a whites-only scholarship created during the course of that class action?

3. Is the rule of Martin v. Wilks, 490 U.S. 755 (1989) -- that individuals alleging harm from a race-conscious program created during one lawsuit can bring a separate lawsuit challenging the legality of that program -- applicable to such absent class members?

PARTIES TO THE PROCEEDING

The parties to the litigation who appeared below are:

Plaintiffs (Petitioners):

Jessie Tompkins
Audra Beasley
James W. Scott
Rodney Smith,

for themselves and all others similarly situated,

Defendants (Respondents):

Alabama State University
Alabama State University Board of Trustees
Dr. Roosevelt Steptoe
Dr. William Harris
State of Alabama

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OPINIONS BELOW

The summary affirmance of the United States Court of Appeals for the Eleventh Circuit was filed on February 25, 1999, and is reprinted in the Appendix at A1.

The April 28, 1998, opinion and order of the United States District Court for the Northern District of Alabama granting defendants' motions to dismiss is reproduced in the Appendix at B1.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 25, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT LAWS

United States Constitution, amendment XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territo-

ry to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory

relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000d

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT OF THE CASE

Because this appeal challenges a judgment which affirmed an order dismissing a complaint, the allegations of the relevant complaint (the Second Amended Complaint -- see Appendix G) must be considered true.

A. Plaintiffs

The relevant complaint alleges that plaintiffs-appellants are African American students at Alabama State University ("ASU"), a historically black institution ("HBI") operated by the State of Alabama in Montgomery County. At the time of the filing of the Second Amended Complaint, Tompkins was a graduate student, and each of the other plaintiffs (Beasley, Scott, and Smith) were undergraduates. App. G6, G8. Each of plaintiffs Tompkins, Beasley, and Smith tried to apply for so-called "Diversity Scholarships" administered by ASU. They were each informed that they could not apply, and their requests for application forms were refused, because they were black. App. G3-G4. Plaintiff Scott would have applied for such

a scholarship, but did not do so because he was black and knew he was ineligible. Id.

Applications for the Diversity Scholarships describe them as follows: "Diversity Scholarship Program For Undergraduate (White) Students." App. G7. See also App. D5 ("Scholarship Program For White Undergraduate Students").

The plaintiffs have each suffered financial hardship as a consequence of their inability to compete for Diversity Scholarships. App. G3. In fact, Tompkins could not continue with his studies in 1995, and was forced to take a year off to earn money before continuing with his studies in 1996. App. G7-G8.

B. Alabama State University

ASU is the successor to the private Lincoln School in Marion. It became state-supported in 1873 as a state "normal" school for the training of African-American teachers. Knight v. Alabama, 787 F. Supp. 1030, 1075-76 (N.D. Ala. 1991), aff'd in part, rev'd in part, vacated in part, and remanded, 14 F.3d 1534 (11th Cir. 1994) (hereinafter "Knight I").

Along with Alabama A&M University ("AAMU"), ASU is one of two HBIs in the State of Alabama. Although a substantial majority of black college students in Alabama now attend predominantly or historically white institutions (Knight I, 787 F. Supp. at 1063, 1288), and although, by the mid-1980's, a majority of black first-time freshmen from the Montgomery County area were attending the majority white schools in that area (Auburn University Montgomery and Troy State University Montgom-

ery) (id. at 1267), ASU retains an important role for the education of black citizens in Alabama.

Historically, ASU resisted the trend of many black colleges to follow the early 20th century trend toward the "Hampton-Tuskegee" model, which essentially required blacks to work in the fields from dawn to dusk, and then attend rudimentary classes from 7:00 to 9:00 p.m. ASU retained Latin and the classics in its curriculum, and incurred the wrath of the white-controlled General Education Board (the primary state funding organization) as a consequence. Id. at 1093-94. Its graduates, though, did as well or better than whites on state teacher examinations. Id. at 1094.

ASU also played a critical role during the civil rights movement in Alabama in the 1950's and 1960's. Indeed, faculty at ASU were catalysts for the event that began the modern Civil Rights Movement, the Montgomery bus boycott. Id. at 1117. Rosa Parks was a graduate of ASU's laboratory school, and ASU students played significant roles throughout the sit-ins of the 1960's. Id. at 1118-19. See also id. at 1047 (ASU and AAMU "were on the cutting edge of the Civil Rights Movement of the 1950's and 1960's and stood as beacons in the night, broadcasting the promise of the Constitution to millions of American citizens who were denied its protections").

Even today, ASU is a "critically important institution for the life of the black community." Id. at 1117. Part of the difficulty of any efforts to "desegregate" ASU is that students, faculty, and alumni of that institution all feel strongly about maintaining its identity as a "black" institution. Knight v. Alabama, 900 F. Supp. 272, 313-14 (N.D. Ala. 1995) (hereinafter, "Knight III"). The vast

majority of students (roughly 97%) attending ASU are black. Knight I, 787 F. Supp. at 1291, 1372. See also Knight III, 900 F. Supp. at 304.

C. The *Knight* Litigation

Because the courts below, in dismissing plaintiffs' claims, relied on events in a separate lawsuit, Knight v. Alabama, N.D. Ala. No. CV 83-M-1676-S, a review of that litigation, and its relationship to the whites-only scholarships at issue here is appropriate.

On July 11, 1983, the United States Department of Justice sued the State of Alabama alleging vestiges of discrimination throughout Alabama's system of higher education. Shortly thereafter, John F. Knight, Jr. and other alumni, students, and faculty of ASU (who had previously filed a suit alleging that the desegregation of ASU was being impeded by duplicative programs in the two other state universities located nearby in Montgomery County: Auburn University Montgomery and Troy State University Montgomery) intervened in the action brought by the United States. Knight I, 787 F. Supp. at 1048-49.

A first trial began on July 1, 1985; the result was reversed on the ground, inter alia, that the judge on the case should have been disqualified. After remand, the court conditionally certified the following class on June 15, 1990:

> all black citizens of Alabama and all past, present, and future students, faculty, staff, and administrators of Alabama State University and Alabama A&M University.

Knight I, 787 F. Supp. at 1051.[1] Subsequently, the court ordered the incorporation of all the proceedings from the 1985 trial, subject to objection, into the record for the new trial. It then held a new trial from October 29, 1990 through April 16, 1991. Id.

The court viewed its job as "address[ing] the intensely factual questions about whether vestiges of historical racial discrimination persist in Alabama's system of public higher education." Id. at 1066. Decided several months before this Court's decision in United States v. Fordice, 505 U.S. 717 (1992), though, the court was plainly troubled by the question of whether the Fourteenth Amendment required the elimination of all such "vestiges." At times, at least, the court understood that the racial identifiability of a school alone was not a "vestige" that properly should be eliminated. Knight I, 787 F. Supp. at 1166 (no legal obligation "that a previously segregated institution achieve a stated level or percentage of black students in it [sic] student body in order to defeat a Title VI or Fourteenth Amendment claim based on the vestiges of discrimination"); id. at 1320 n.141 (fact that Alabama HBIs have "predominantly black student bodies, and are under the control of predominantly black boards of trustees, . . . while having antecedents in the segregative past, do not automatically render them continuing illegal vestiges").

Yet throughout the course of its opinion, the court required Alabama institutions, both historically white and historically black, to change their racial identifiability by

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[1] At trial, the court found that there were over one million blacks in Alabama, roughly two-thirds of whom were over the age of 18. Knight I, 787 F. Supp. at 1064.

recruiting, admitting, hiring, and retaining more "other race" individuals. Thus, for example, although neither the Knight plaintiff class nor the United States introduced "any evidence that any individual was denied a faculty or administrative position at any state institution of higher education on the basis of race" (id. at 1187 (emphasis added)), the court ordered Auburn University to increase the number of both black faculty and black administrators (id. at 1190-91).[2] So, too, the court ordered ASU to "design and implement a recruitment policy directed at white students." Id. at 1291.

The court appeared equally torn about the use of race-conscious remedies to alleviate racial identifiability. The court recognized that race-conscious measures to increase black enrollment or presence would need to pass strict scrutiny. Id. at 1164 n.59 (lowering ACT entrance requirement only for blacks would raise "legal issues") and 1372-76 (Alabama code section requiring at least one-half of ASU's Board of Trustees to be from "the prevailing minority population of the state" failed strict scrutiny because it "cannot be justified as a remedy of past discrim-

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[2] Compare, e.g., Ayers v. Fordice, 111 F.3d 1183, 1226 (5th Cir. 1997) (rejecting argument that district court should have ordered State of Mississippi to modify its race-neutral hiring practices to hire more black faculty as a means of redressing racially-identifiable tenured faculty and administrators at colleges and universities; "Fordice rejects the notion that the State must remedy all present discriminatory effects without regard to 'whether such consequences flow from policies rooted in the prior system' . . . Plaintiffs identify no such policies with respect to selection of tenured faculty and administrators").

ination").[3] Yet the court not only ordered the various kinds of relief described above, it also identified various discriminatory "remedies" already being employed by Alabama's state colleges -- and never discussed (much less analyzed) what "present effect of past discrimination" aside from racial identifiability such "remedies" were intended to ameliorate and how they did so. E.g., Knight I, 787 F. Supp. at 1177 (University of Alabama has "made significantly higher salary offers to African Americans than similarly situated Caucasian faculty") and 1306 (University of Alabama Law School gives scholarship money to every African American student; "[n]on-minority students would need exceptionally high qualifications to be considered for the money black students receive").[4]

On the same date as the finding of facts and conclusions of law, the court entered an order certifying the class that it previously had certified "conditionally." App. C1.

Shortly after the 1991 decision, the State began appropriating funds to ASU for Recruiting/Minority Scholar-

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[3] See also Knight III, 900 F. Supp. at 342 n.47 (if proposed remedy to "empower black faculty and students to have an equal voice in deciding whether and how Black Studies will be included in the curriculum" was a "race-conscious" one, it would be subject to strict scrutiny).

[4] Finally, the court made a number of factual findings that can only be described as counterintuitive. For example, it apparently accepted the testimony of one expert who asserted that the University of Alabama Board of Trustees in the 1950's "had adopted the policy of resisting segregation" (id. at 1108 (emphasis added)) and that then-Governor George Wallace had not, at that time, yielded, in "[his] opposition to segregation" (id. at 1109 (emphasis added)).

ships, so that ASU could better attract white students. Knight III, 900 F. Supp. at 309-10. ASU spent about a half million dollars in the years 1992 through 1995 for scholarships for 144 students. Id. at 310.[5]

The Knight plaintiffs appealed part of the court's judgment; most of the defendants did not. Several years later, the Eleventh Circuit affirmed in part, reversed in part, vacated in part, and remanded. Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) ("Knight II"). The court focused on this Court's analysis in Fordice, holding that Fordice required a determination of whether (1) a particular challenged policy "is 'traceable' to decisions that were made or practices that were instituted in the past for segregative reasons, thus rendering it a vestige of segregation," (2) the challenged policy continues to have segregative effects, and (3) the challenged policy can be reformed practicably and consistent with sound education practices. Knight II, 14 F.3d at 1540-41. It applied this standard to the various claims plaintiffs had raised and considered whether the district court's pre-Fordice analysis was sufficient.

Primarily dealing with issues not directly relevant here, the court of appeals held that (1) in considering the "limited missions" that had been given the HBIs, the district court had failed to consider whether such limited missions have segregative effects (Knight II, 14 F.3d at 1544-46); (2) the district court erred in concluding that the

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[5] In its 1995 decision, the court characterized these moneys as part of the "sums appropriated, awarded or transferred because of this Court's orders and Decrees." Knight III, 900 F. Supp. at 373. Presumably, then, the court believed such scholarship awards to be, at the very least, authorized by its 1991 decree.

distribution of federal funds to the two state "land grant" colleges (Auburn and AAMU) was not traceable to the de jure era and that, accordingly, the district court needed to consider whether such distribution had segregative effects (id. at 1549-51); (3) the district court had not properly considered whether the absence of curricula of African American thought, culture and history constituted a "policy" rooted in past discrimination, and thus a remand was necessary for that purpose as well (id. at 1552-53); and (4) the district court did not clearly err in holding that the historically white institutions ("HWIs") did not maintain a racially hostile atmosphere (id. at 1553).

Upon remand, the district court, for reasons not altogether clear from its subsequent 1995 opinion, held another plenary trial. Moreover, the court did not limit itself to considering the possible segregative effects of the HBIs' limited missions and the distribution of federal land grant funds, and the traceability of any purported absence of curricula dealing with African American heritage and culture. It also considered additional "policies and practices with continuing segregative effects." Knight III, 900 F. Supp. at 306. These "practices" apparently included the HBIs' outspoken commitment to their black heritage (id. at 313). The court recognized the pressure from alumni, faculty, and students to maintain such a commitment, but believed that such commitment made it more difficult to desegregate. ASU and AAMU, the court found,

> have maintained and asserted their black heritage in ways, and to a degree, that has had a segregative effect on student choice.
>
> The Court concludes that ASU and AAMU must henceforth act in a manner such that their pride in

> their heritage does not hinder their, the state's or the Court's efforts to reduce segregative effects on student choice . . .

Id. at 314. See also id. at 319 ("Some HBIs have difficulty attracting white students because they aggressively and outspokenly maintain their black heritage in a manner that discourages whites from attending . . . Unfortunately, ASU and AAMU currently labor under such a difficulty, ASU more so than AAMU").

Similarly, although it had not been part of the court of appeals' remand, the court also reexamined the historic underfunding of the HBIs (outside of the federal land grant aid that had been addressed by the court of appeals). The court repeated both many of its findings from the 1991 trial, id. at 308-09, 311-12, and its conclusion that such historic underfunding was attributable to the de jure era.[6] It did note, however, the funding of Recruiting/Minority Scholarships at AAMU and ASU to assist in recruiting white students, although it expressed dissatisfaction with the manner in which such moneys were being spent at

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[6] Curiously, though, in light of the court of appeals' emphasis on this Court's three-part Fordice analysis, the district court never considered whether the underfunding had a continuing segregative effect. While it is, of course, true that such underfunding makes it more difficult for HBIs to attract white students, it also makes it more difficult to attract some black students, who are thus more likely to go to HWIs. E.g., Knight I, 787 F. Supp. at 1046 (danger of creating parallel historically white and historically black institutions is that it "cuts too close to the doctrine repudiated by Brown v. Board of Ed."), 1282 n.109 (sound academic programs and strong facilities will attract both black and white students), and 1288 (noting that the number of black students enrolled at the University of Alabama at Huntsville had increased, but that the number of non-blacks also had increased, leaving the percentage of black students roughly the same).

ASU.[7]

The court concluded that the historic underfunding of the HBIs had led to white students perceiving the HBIs as inferior institutions and, consequently, these "perceptions" were traceable to the de jure era. Knight III, 900 F. Supp. at 320. See also Knight I, 787 F. Supp. at 1046 ("the Court must be certain that students who choose to attend the state's predominantly black institutions are not, as a result, stamped with the badge of inferiority resulting from the history of segregation"). The court did not discuss any survey or other evidence that led it to conclude that white students have such perceptions. Nonetheless, the court further concluded that "other race" scholarships were the "most educationally sound and practicable

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[7] Knight III, 900 F. Supp. at 310 ("Unfortunately, ASU officials saw fit to spend . . . $ 100,000 of the first Scholarship appropriation on administrative expenses"). In both decisions, the court expressed profound dissatisfaction with the management of the HBIs on a variety of different matters. E.g., Knight I, 787 F. Supp. at 1282 n.109 (court is "perplexed by certain of the choices which ASU and AAMU have made respecting capital expenditure decisions") and 1283 (concluding that ASU should receive $ 9,873,078 in capital expenditures to eliminate the vestiges of past discrimination, but that ASU must secure Court approval before spending it); Knight III, 900 F. Supp. at 297 (noting AAMU's "skewed priorities" in spending money on a new dorm and a new stadium, and expressing disagreement with AAMU officials that such expenditures will enhance significantly its image), 303 (finding "problematic conduct" by ASU officials in losing cable channel and failing to cooperate with other Montgomery universities in creating joint program), 304 (noting that the American Association of University Professors had put ASU on its censure list in 1989 and characterizing ASU's "attitude for the five years following censure" as "disinterest in being removed from the censure list"), 304-05 (enumerating negative publicity about ASU), and 374 ("former presidents [of the HBIs] have unfortunately acted in the past in ways bringing disrepute to their institutions").

mechanism to eliminate those particular perceptive barriers." Knight III, 900 F. Supp. at 320.

The court hastened to add that the problem at the HBIs was a perception, not necessarily reality, and that "increasing the number of white students at an HBI helps eliminate that perception." Id. Thus, the court concluded, the concerns of Justice Thomas expressed in his concurrence in Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J. concurring) did not pertain because "the perception of inferiority is not a guess or a bias but a reality born out by evidence." Knight III, 900 F. Supp. at 320.[8] The court rejected less race-conscious remedies for these perceptions, like a merger between ASU and the nearby Troy State Montgomery, as impracticable and not "educationally sound." Knight III, 900 F. Supp. at 321.

The court required the State to make annual appropriations of $ 1,000,000 to be made to each of ASU and AAMU, available only for undergraduate students with Alabama residency.[9] It further required an auditing of the funds by an accounting firm, with the report to be filed with the court (id. at 356), and a report from a certifying official of each institution to describe "how the use of the scholarship funds during the previous year has assisted in diversifying the student body of the University . . . " (id.

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[8] Although the court did not identify which of Justice Thomas's concerns it was distinguishing, it may have been alluding to Justice Thomas's statement that "[i]t never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior." Jenkins, 515 U.S. at 114 (Thomas, J. concurring).

[9] In 1996, ASU moved to expand the whites-only scholarships to graduate students. The Knight plaintiffs apparently did not contest that motion, and it was granted by the court. App. D1-D4.

at 357). The court also required an accounting of the moneys ASU had spent on Recruiting/Minority Scholarships since 1992. Id. at 373.

Although the court stated that it would review the certifying official's report to determine whether the funds were being used properly (id. at 358), there was nothing in the court's order that required any subsequent surveys of "white perceptions" to be made, to determine if the scholarships were remedying the perception of inferiority. The record does not disclose any such survey ever having been done.

Although appeals were filed from the court's 1995 judgment, all of them were dismissed voluntarily. App. E2. The court did not order notice of the terms of its remedial decree to be transmitted to the class, and the plaintiffs in this case had no notice of those terms.

D. The Proceedings Below

This action was commenced on March 31, 1997 with the filing of the original complaint by plaintiff Jessie Tompkins, acting pro se, in the Middle District of Alabama. Because the original complaint alleged violations of various federal civil rights laws, the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Pursuant to a motion made by the defendants, and a recommendation by a magistrate judge, the court transferred the case to the Northern District of Alabama pursuant to 28 U.S.C. § 1404 by order dated June 16, 1997.

After transfer, the other plaintiffs joined the suit, and they jointly filed and served a Second Amended Complaint (the "Complaint") on or around October 1, 1997.

The Complaint set forth the allegations described above in Part "A," supra, and asserted violations of the Equal Protection Clause and 42 U.S.C. §§ 1981, 1983, and 2000d et al. See Appendix G.

Subsequently, defendant ASU Board of Trustees, along with certain individual defendants associated with ASU (Steptoe and Harris), moved to dismiss the Complaint on the ground that plaintiffs were obligated to challenge the all-white scholarships in the Knight litigation. The State of Alabama filed a separate motion to dismiss, arguing, inter alia, that principles of res judicata and collateral estoppel required dismissal. Plaintiffs opposed, arguing (inter alia) that this Court had rejected the "impermissible collateral attack" in Martin v. Wilks, 490 U.S. 755 (1989) and that this Court had found principles of res judicata and collateral estoppel inapplicable to inadequately-represented absent class members in Hansberry v. Lee, 311 U.S. 32 (1940). Plaintiffs argued that they were not adequately represented in the Knight action, and that, indeed, no one could possibly represent the interests of all class members when the class is defined to include both "all black citizens of Alabama" and "all past, present, and future students, faculty, staff, and administrators" (both black and white) of the HBIs in Alabama.

The Knight class representatives moved to intervene in the litigation and filed a proposed motion to dismiss arguing that the relief sought in the Complaint was beyond the authority of the court to grant and, alternatively, that dismissal on res judicata grounds was appropriate. (The court had previously instructed the Knight class representatives to submit an amicus brief, and apparently treated the motion to dismiss as such. App. B4, E3.) The United States submitted a letter which primarily echoed

the motion of ASU, arguing that plaintiffs could not attack the all-white scholarships in a separate litigation, but were required to intervene in the Knight litigation. App. B4.

By decision and order dated April 28, 1998, the district court granted defendants' motion to dismiss, without prejudice to plaintiffs moving to intervene in the Knight litigation. The court recognized the general rule of Hansberry v. Lee, that inadequately-represented class members could bring an independent action challenging issues considered in an earlier class action. App. B7. But it never reached the issue of whether plaintiffs were "adequately represented" by the class representatives in the Knight litigation. Rather, it concluded that lower courts had "carve[d] out an exception to the general rule in Hansberry" (App. B11) in cases involving school desegregation, and that, in such cases, an independent action could not be brought. It cited three cases for this proposition: Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973); Miller v. Bd. of Ed., 667 F.2d 946 (10th Cir. 1982); and Rivarde v. Missouri, 930 F.2d 641 (8th Cir. 1991). App. B8-B11.

The district court at least recognized that none of the cases it relied upon "made any attempt whatsoever to reconcile the two lines of authority." App. B11. Concluding that the task of reconciliation fell upon it, though, the district court concluded that Hines, Miller, and Rivarde carved out an exception to the general rule enunciated in Hansberry for two reasons: first, that "the Hines rule is premised upon interests in judicial economy in desegregation cases" (id.), and, second, that desegregation cases are ongoing, and thus distinguishable from Hansberry in that regard (App. B11-B12). The district court did not explain whether its newly-discovered exception to

the rule of Hansberry applied to any kinds of desegregation cases other than school desegregation cases, and did not distinguish desegregation cases from other ongoing institutional litigation.

In a footnote, the court concluded that the holdings of the lower court cases it relied upon were not "altered in any respect by the Supreme Court's decision in [Martin]" because "Martin involved the claims of nonparties who failed to intervene in a class action and thus were permitted to attack collaterally the class judgment" whereas the plaintiffs in the three cases relied upon by the court "included members of the original class who were parties in the original class action." App. B9-B10 n.4 (emphasis in original).

Plaintiffs appealed. By Per Curiam order dated February 25, 1999, the Eleventh Circuit Court of Appeals "affirmed for the reasons set forth in the comprehensive ORDER of the district court . . . " App. A1.

After the district court's dismissal, in an attempt to protect their rights, and pursuant to the court's instructions, plaintiffs in this action moved to intervene in the Knight litigation. The district court ordered a period of discovery to resolve that motion. Appendix F (order requiring discovery). More than one year after the dismissal of their own lawsuit, and over two years since the filing of the original complaint in this action, plaintiffs are still litigating the propriety of intervention.

REASONS FOR GRANTING THE PETITION

The lower courts in this case held that a group of African Americans precluded from even applying for

scholarship moneys reserved for whites cannot commence a lawsuit to seek reasonably expeditious relief from this affront to the Constitution, but rather must wade into the morass of a multi-party, multi-issue, 15-year old "monumental desegregation lawsuit" (App. B2). If that were really the law, it would be time to change it.

It is not the law. In the legal jurisprudence of this country, there have been two principal means of precluding collateral attacks on judgments: (1) the principles of res judicata and collateral estoppel, applicable to parties, and (2) the "impermissible collateral attack" doctrine that existed prior to Martin v. Wilks. The innovative creation of yet a third means of precluding collateral attack -- apparently applicable only to parties, but based, remarkably enough, on the very same principles of "judicial efficiency" that animated the "impermissible collateral attack" doctrine prior to Martin -- simply cannot be reconciled with this Court's precedents and the limits it has placed on the two standard doctrines. Indeed, the new "impermissible collateral attack" doctrine is at war with Martin, the case that buried the old "impermissible collateral attack" doctrine.

A. The Opinion Of The Courts Below Is Directly Contradicted By *Martin*

In considering whether to grant a petition for a writ of certiorari, this Court considers whether a lower court has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). The decision of the court of appeals falls squarely in this category.

The rationale of the lower courts in this case is a direct affront to this Court's decision in Martin v. Wilks. Martin specifically rejected the "impermissible collateral attack" doctrine; the lower courts here resurrect it. Martin stated the rule that a person "cannot [be] obligate[d] . . . to intervene . . . " (Martin, 490 U.S. at 763) and that any effort to change that rule would require the rewriting of the Federal Rules of Civil Procedure (id. at 767); the courts below held that the plaintiffs here were obligated to intervene. Martin held that considerations of "judicial efficiency," even in an ongoing litigation to remedy systemic discrimination, were simply inadequate to overcome the fundamental right of each individual to have his or her own day in court (id. at 767 (rejecting argument that, if collateral attacks are allowed, "[j]udicial resources will be needlessly consumed in litigation of the same question")); the courts below specifically relied upon these same "judicial efficiency" and "ongoing litigation" arguments.

Even the district court's half-hearted footnote effort to distinguish Martin conspicuously ignores the plain text of that opinion. The district court's footnote claimed that Martin dealt only with non-parties, and thus did not pertain to absent class members, who (the court claimed) are "parties." App. B9-B10 n.4. But, again, such a characterization flies in the face of Martin, which stated that absent class members like those in Hansberry are not parties:

> A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.2
>
> Ftn. 2 : We have recognized an exception to the

> general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. Hansberry v. Lee, 311 U.S. 32, 41-42 (1940) ("class" or "representative" suits); Fed. Rule Civ. Proc. 23 (same) . . .

Martin, 490 U.S. at 762 & n.2 (emphasis added). Thus, the district court's effort to "distinguish" Martin is directly contradicted by Martin itself. Absent class members are not parties; they are "strangers to the litigation." They may be bound by a judgment nonetheless if their interests were adequately represented -- precisely the analysis called for by this Court's decision in Hansberry v. Lee. Thus, Martin makes clear that its analysis does apply to absent class members, unless those asserting preclusion can meet the requirement of "adequate representation" set forth in Hansberry -- precisely the analysis that the lower courts here refused to do.[10]

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[10] Nor do the cases cited by the district court suggest that Martin should be inapplicable where plaintiffs are "members of the original class" (App. B10 n.4), much less that there is a special exception to Hansberry for school desegregation cases. In Hines, there is nothing in the court's opinion that states the plaintiffs were members of the original class. (Indeed, the earlier class was not even defined in that decision.) See 479 F.2d at 763-64. In Miller, the court specifically refused to answer the question of whether the litigants seeking to challenge the judgment were absent members of the original class. See 667 F.2d at 949. (And, as shown below, the Tenth Circuit does not create any exception to Hansberry for school desegregation cases.) Thus, both Hines and Miller are best seen as pre-Martin "impermissible collateral attack" cases whose validity was undermined by Martin.

In Rivarde, it is true, the Eighth Circuit did refuse to permit a (continued...)

B. The Decisions Of The Lower Courts Create A Circuit Split

The view of the lower courts in this action, that there is an exception to the application of Hansberry v. Lee for school desegregation cases, creates a split between the Eleventh and Tenth Circuits. In Garcia v. Bd. Of Ed., School District No. 1, 573 F.2d 676 (10th Cir. 1978), the Tenth Circuit considered a lawsuit by Hispanic schoolchildren in Denver who had been included within the class definition of an earlier desegregation lawsuit. Id. at 678 (earlier desegregation lawsuit included plaintiff class of Hispanic children attending schools with a predominantly minority population). The Court specifically applied Hansberry to determine whether those plaintiffs could bring their independent action or were bound by the decree in the earlier case. Garcia, 573 F.2d at 679-80. (Garcia, then, also demonstrates that Miller simply does not create the exception that the decisions of the courts below would have it create. See n.10, supra.) While the court in Garcia ultimately concluded that the plaintiffs had been adequately represented, it did so in the separate litigation, and did not require the plaintiffs there to intervene in the school desegregation litigation.

This Court, then, should grant the petition in order to resolve this split in authority.

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[10](...continued)
separate suit by absent class members in a post-Martin case. But the Eighth Circuit relied primarily on Hines and Miller and failed even to consider whether the holdings of those cases had been undermined by Martin. Moreover, as with Hines and Miller, it is somewhat presumptuous to assume that any lower court is making a specific exception to a precedent of this Court (like Hansberry) without even bothering to mention that precedent.

CONCLUSION

This Court should grant the petition.

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APPENDICES

APPENDICES

A Order Of The United States Court Of Appeals For The Eleventh Circuit, Affirming The Judgment Of The District Court (Filed on February 25, 1999) A1

B Order Of The United States District Court For The Northern District Of Alabama, Dismissing The Tompkins Action (Entered on May 1, 1998). B1

C Order Of The United States District Court For The Northern District Of Alabama, Unconditionally Certifying The Class In The Knight Action (Entered on December 30, 1991). C1

D Order Of The United States District Court For The Northern District Of Alabama In The Knight Action, Approving Alabama State University's Motion To Expand Its Diversity Scholarship Program (Entered on September 6, 1996). D1

E Order Of The United States District Court For The Northern District Of Alabama (Entered December 1, 1997). E1

F Order Of The United States District Court For The Northern District Of Alabama In The Knight Action, Deferring A Ruling On The Motion To Intervene And Ordering Discovery Period (Entered on October 29, 1998). F1

G Second Amended Complaint (October 1, 1997). G1

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-6409
Non-Argument Calendar

D. C. Docket No. CV-97-M-1482-S

JESSIE TOMPKINS, AUDRA BEASLEY, JAMES W. SCOTT, RODNEY SMITH, for themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

ALABAMA STATE UNIVERSITY BOARD OF TRUSTEES, ALABAMA, STATE OF; WILLIAM H. HARRIS, President of Alabama State University; JACKIE WILLIAMS, Dr., President of Student Affairs; ROOSEVELT STEPTOE, Dr., President of Academic Affairs; KEITH EDWARDS, Director of Student Activities, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(February 25, 1999)

[File-Stamped:
U.S. Court of Appeals
Eleventh Circuit, February 25, 1999,
Thomas K. Kahn, Clerk]

Before HATCHETT, Chief Judge, BLACK, Circuit Judge, and FAY, Senior, Circuit Judge.

PER CURIAM:

The dismissal of this action is affirmed for the reasons set forth in the comprehensive ORDER of the district court dated April 28, 1998.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Jesse Tompkins, Audra Beasley, James W. Scott, Rodney Smith, for themselves and all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 97-M-1482-S

Alabama State University, Alabama State University Board of Trustees, State of Alabama, Dr. William H. Harris, President of Alabama State University, Dr. Roosevelt Steptoe, President of Academic Affairs, Director of Student Activities, Governor Fob James, Ex-Officio President, Joe L. Reed, Chairman, Frankye U. Underwood, Vice Chairwoman, Richard Arrington, Jr., B. Maxine Corley, James C. Cox, LaRue W. Harding, Toreatha M. Johnson, Larry H. Keener, Patsy D. Parker, Donald V. Watkins, all named in their individual and official capacities,

Defendants.

[File Stamped and Entered on May 1, 1998; N.D. Ala.]

ORDER

This is a civil rights case in which Plaintiffs challenge Defendant Alabama State University's use of "other-race" scholarships to remedy vestiges of segregation found to exist in the Alabama system of public higher education. The case is before the Court on Defendant State of Alabama's Motion to Dismiss and Defendants Alabama State University Board of Trustees, et al.'s Motion to Dismiss.

1. Background

A summary of the factual context in which this lawsuit is brought begins long before the filing of Plaintiffs' Complaint. This case exists in the shadow of a monumental desegregation lawsuit involving all public universities in the State of Alabama and a plaintiff class of all black citizens of the State of Alabama. Knight v. Alabama, No. 83-M-1676, slip op. at 1 (N.D. Ala. Dec. 30, 1991) (certifying class). The Court therefore will first summarize the relevant history of the Knight litigation, and afterward will summarize the relevant history of this case.

A. The Knight Litigation

The Knight litigation commenced on January 15, 1981, when John F. Knight, Jr., and a class of other alumni, students, and faculty members of Alabama State University ("ASU") filed suit in the Middle District of Alabama to attack alleged vestiges of segregation in public higher education. Knight v. Alabama, 787 F. Supp. 1030, 1048 (N.D. Ala. 1991) ("Knight I"). Since then, the litigation has followed a complicated and convoluted path in which the following entities were added as parties: the United States, the Governor of Alabama, the Alabama State Board of Education, and all four-year Alabama public universities and colleges. Id. at 1048-50.

This Court held two trials in the Knight case, one lasting six months and another lasting six weeks. Id. at 1051; Knight v. Alabama, 900 F. Supp. 272, .280 (N.D. Ala. 1995) ("Knight II"). Both trials resulted in findings that vestiges of segregation remained within the Alabama system of public higher education, and that these vestiges violated Title VI of the Civil Rights Act of 1964 as well as

the United States Constitution. Knight I, 787 F. Supp. at 1368; Knight II, 900 F. Supp. at 280-281

A summary of the remedies approved by the Court to eliminate these vestiges of segregation would fill dozens of pages. The only remedy relevant to the instant lawsuit is the creation of a scholarship program that employs race as a criterion when selecting students to receive the scholarships. Knight II, 900 F. Supp. at 319-21, 356-58. These scholarships, known as "other-race" scholarships, are designed to encourage non-African American students to attend historically black institutions. Id.

The Court has retained active jurisdiction over the Knight case to this day, including the appointment of a Monitor and an Oversight Committee to oversee on a daily basis the administration of the Court-ordered remedies in the Knight litigation. For example, as recently as April 24, 1998, the Court held a hearing in order to review the progress toward unification of the Alabama land grant system.

B. The Tompkins Litigation

On October 1, 1997, Plaintiffs Jessie Tompkins, Audra Beasley, James W. Scott, and Rodney Smith filed this lawsuit on behalf of all non-white individuals similarly situated to Plaintiffs. (Second Amended Compl. at 4.) Plaintiffs are black citizens of the State of Alabama, and thus are members of the class certified in the Knight litigation.

Plaintiffs nonetheless claim that the "other-race" scholarships created at ASU pursuant to the Court's 1995 Decree in Knight II violate their rights under the Fourteenth Amendment and 42 U.S.C.A. §§ 1981, 1983, and 2000d.

(Id. at 2.) Plaintiffs name as Defendants the State of Alabama, ASU, the ASU Board of Trustees, and various ASU administrators. (Id. at 3-4.) Plaintiffs seek to certify this case as a class action pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3). (Id. at 4.)

On October 20, 1997, Defendant ASU Board of Trustees and several of the individually named Defendants filed the instant Motion to Dismiss, which was followed on November 4, 1997, by Defendant State of Alabama's Motion to Dismiss.

On December 12, 1997, the Court invited the named Plaintiffs in Knight to file a brief as amicus curiae. On January 5, 1998, the Knight Plaintiffs filed their amicus brief and an accompanying Motion to Intervene in the Tompkins case.

Finally, on February 17, 1998, the United States sent to the Court a letter outlining its position with respect to the Tompkins case. Although the letter is not styled as an official motion, the United States served a copy of the letter on all parties involved in the Knight and Tompkins cases.

Defendants' Motions to Dismiss, the Knight Plaintiffs' amicus brief, and the letter by the United States all raise several objections to the Court's consideration of the claims raised by the Tompkins Plaintiffs. First, Defendants, the Knight Plaintiffs, and the United States all argue that the Tompkins Plaintiffs have brought their claims in the wrong forum, thus warranting dismissal of this case with leave to request intervention in the Knight litigation. Defendants and the Knight Plaintiffs also argue that the Tompkins Complaint must be dismissed on the merits because: (1) the Tompkins Plaintiffs lack standing to bring

their claims; and (2) the Tompkins Plaintiffs' claims are barred by res judicata and collateral estoppel.[1]

The Tompkins Plaintiffs offer two responses to these arguments. First, Plaintiffs argue that this lawsuit is not a collateral attack on the relief ordered in the Knight litigation, but is rather a separate action based on an entirely independent cause of action. Second, Plaintiffs argue that, if this lawsuit is classified as a collateral attack on the Knight litigation, Plaintiffs are entitled by law to attack collaterally the remedies adopted in Knight so long as they demonstrate that the Knight Plaintiffs inadequately represented their interests as class members in the Knight litigation. The Tompkins Plaintiffs thus argue that they intend to show that their interests as class members in Knight were represented inadequately by the Knight Plaintiffs.

II. Discussion

A. Plaintiffs' Argument That the Tompkins Lawsuit Is Not a Collateral Attack

Plaintiffs argue that the Tompkins lawsuit is not a collateral attack on the relief ordered in the Knight litigation, but is rather a separate action based on an entirely independent cause of action. Plaintiffs therefore argue that the Tompkins case raises no procedural or res judicata concerns with respect to the Knight litigation. In

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[1] Defendants and the United States also argue that the Tompkins Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(7) for failure to join indispensable parties. Because the Court concludes that dismissal of this case is warranted on other grounds, the Court need not address this argument.

support of this argument, Plaintiffs rely primarily on Barfus v. City of Miami, 936 F.2d 1182 (11th Cir. 1991).

Plaintiffs' argument can be rejected with little effort. In Barfus, the court held that nonminority firefighters were entitled to bring a separate Title VII employment discrimination action against the City of Miami even though the firefighters' union signed a consent decree in another case that governed the hiring of minority firefighters. 936 F.2d at 1186-88. The court premised its holding on the fact that the nonminority firefighters did not challenge the terms of the decree itself or seek to modify the decree in any way. Id. at 1185 & n.14 (the firefighters "do not argue that actions taken pursuant to the decree resulted in discrimination") (emphasis added). Instead, the firefighters raised individual and independent claims premised upon Title VII. Id. "The issue sought to be litigated here was not involved in the consent decree" signed by the firefighters' union. Id. at 1188; see also O'Shea v. City of San Francisco, 966 F.2d 503, 505 (9th Cir. 1992) (res judicata is not implicated when plaintiffs "do not challenge the terms of the decree, nor seek to modify the decree")

The Tompkins Plaintiffs, on the other hand, directly challenge the terms of a decree entered by the Court in Knight that ordered the creation of "other-race" scholarships. Plaintiffs themselves admit as much, conceding in their brief that the Tompkins action "is an attack on the [Knight II] Decree itself." (Pls.' Br. in Opp. to Mot. to Dismiss the Second Amended Compl. at 6.) The Tompkins Plaintiffs also challenge an issue that was expressly litigated by the parties and addressed by the Court in Knight II before the Court entered its 1995 Decree.[2]

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[2] The Knight parties submitted extensive briefing on the remedial use of "other-race" scholarships and the constitutional standards that control their implementation and design. E.g. State Defs., Proposed

Barfus thus is factually inapposite to the circumstances presented here, and does not constitute authority that allows Plaintiffs to maintain the Tompkins case as an independent discrimination action.

B. Whether Tompkins Must Be Dismissed as a Collateral Attack on the Relief ordered in Knight

As a general rule, the res judicata effect of a judgment in a class action extends to the entire certified class, thus binding absent class members. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808-10 (1985); Gonzales v. Cassidy, 474 F.2d 67, 74 (5th Cir. 1973).[3] Federal courts, however, recognize that absent class members hold a due process right to attack collaterally the res judicata effects of a class action judgment if the absent class members establish that the class representatives inadequately represented the interests of the class. Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Guthrie v.

Findings of Fact and Conclusions of Law, at 64-65, 117-23, 179-80 (filed on or about May 1, 1995, in Knight); 1995 UAS Proposed Findings o Fact, at 149-56 (filed on or about May 1, 1995, in Knight); Alabama A&M Univ.'s Mem. of Law Regarding Podberesky v. Kirwan (filed on or about June 20, 1995, in Knight); Knight-Sims Pls.' Mem. on Recent Decisions Relating to Other-Race Scholarships (filed on or about June 30, 1995, in Knight); Resp. of Bd. of Trustees of the Univ. of Alabama to Briefs Filed by Alabama A&M, ASU, and the Knight-Sims Pls. Regarding the Impact of the Podberesky Case and Recent Supreme Court Opinions (filed on or about July 20, 1995, in Knight); Knight-Sims Pls.' Reply to the Univ. of Alabama's Podberesky Br. (filed on or about July 25, 1995, in Knight).

[3] Opinions of the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the Eleventh Circuit, are binding precedent on this Court. See Bonner v. City of Pritchard, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

Evans, 815 F.2d 626, 628 (11th Cir. 1987); Gonzales, 474 F.2d at 74.

Several courts, including the former Fifth Circuit, do not apply the general rule enunciated in Hansberry, Guthrie, and Gonzales when the original class action is a school desegregation case. Rivarde v. Missouri, 930 F.2d 641, 642-43 (8th Cir. 1991); Miller v. Board of Educ. 667 F.2d 946, 948-49 (10th Cir. 1982) (per curiam); Hines v. Rapides Parish School Bd., 479 F.2d 762, 765 (5th Cir. 1973). As summarized by the Tenth Circuit:

> The necessity for an orderly administration of the courts does at times require the consolidation of actions or a direction to seek intervention in ongoing class actions where the same issues are presented[,] where the plaintiffs are apparently members of the class [and where they are] proceeding against the same or some of the same defendants. There is no right to maintain separate actions in these circumstances.

Miller, 667 F.2d at 949. Thus, "separate actions attacking the implementation of [a] desegregation program . . . should not proceed separately," but rather should be dismissed so that the collateral plaintiffs may petition for intervention in the original desegregation case. Id. at 947.

The seminal case for this line of authority is Hines. In Hines, the original desegregation case featured a class of black students who attended public schools in a Louisiana parish and the students' parents. 479 F.2d at 764. After appointing a biracial committee to work with federal and local government officials, the district court approved a plan that was designed to integrate the schools. Id. The district court retained jurisdiction over the case, which

remained "an active viable lawsuit under the control of the district court. Id.

Apparently disenchanted with the plan approved by the district court, a group of black and white parents filed a separate lawsuit challenging the plan adopted by the district court. Id. at 763. The Fifth Circuit expressed its concern with the significant resources that would be expended if such duplicative lawsuits became a regular practice:

> Certainly every group must be allowed the opportunity to show the court that the desired and legally required unitary school system has not been achieved by an earlier court order. [Nonetheless,] . . . this court must . . . set out a method which allows parent groups to present their complaints about the school system which results from a desegregation order without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle.

Id. at 765. The most appropriate course, the court concluded, was for the new set of plaintiffs to petition the district court to allow them to intervene in the original desegregation case. Id. "The petition for intervention would bring to the attention of the district court the precise issues which the new group sought to represent and the ways in which the goal of the unitary system had allegedly been frustrated . . . . If the court felt that the new group had a significant claim which it could best represent, intervention would be allowed."[4] Id.

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[4] The vitality of the holding in Hines is not altered in any respect by the Supreme Court's decision in Martin v. Wilks, 490 U.S. 755 (1989). As the Tompkins Plaintiffs recognize, Martin involved the claims of

(continued . . .)

The Tenth Circuit confronted a similar situation in the context of the historic Brown v. Board of Education desegregation litigation. Miller, 667 F.2d at 947. In Miller, two classes of black students filed separate lawsuits attacking the implementation of the desegregation plan required by the Supreme Court in Brown. 667 F.2d at 947. The district court consolidated the Miller actions and dismissed both, noting that the plaintiffs should have petitioned for leave to intervene in the still-pending Brown desegregation case. Id. The Tenth Circuit agreed. "To allow these actions to proceed independently would result in a duplication and waste of the time and effort of the litigants and the Court. The issue which plaintiffs seek to raise herein are already before the Court in Brown. . . . Furthermore, the continued prosecution of these actions risks inconsistent judgments." Id. at 948.

The Eighth Circuit later relied on Hines and Miller to address factually similar circumstances that arose in a desegregation case involving Kansas City schools. Rivarde, 930 F.2d at 642. In Rivarde, a class of black students brought the original desegregation case, which resulted in a long-term oversight program that continued to be administered by the district court. Id. Later, a group of black students filed a separate lawsuit, alleging that the original desegregation program violated their constitutional rights. Id. The district court dismissed the separate action and instead treated the complaint as a motion to intervene in the original desegregation case. Id. The Eighth Circuit

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(. . . continued)
nonparties who failed to intervene in a class action and thus were permitted to attack collaterally the class judgment. In Hines, the collateral plaintiffs included members of the original class who were parties in the original class action; the same is true of Miller and Rivarde, as discussed below.

affirmed, concluding that, although Hines and Miller are not binding authority in the Eighth Circuit, the cases are sufficiently "factually similar and persuasive" to justify the court's reliance upon the courts' reasoning. Id. at 644.

Hines, Miller, and Rivarde thus do not apply the general rule enunciated in Hansberry that absent class members are permitted to bring separate actions to attack class judgments. In fact, none of the opinions make any attempt whatsoever to reconcile the two lines of authority. This task therefore is left to the Court.

The Court believes that Hines, Miller, and Rivarde carve out an exception to the general rule enunciated in Hansberry. First, and most importantly, the Hines rule is premised upon interests in judicial economy in desegregation cases, which would be contravened by allowing absent class members to wage collateral attacks upon expensive and complicated desegregation plans. See Rivarde, 930 F.2d at 643 (Hines and Miller "based their rulings on interests of judicial economy"). In other words, in the costly and time-consuming microcosm of desegregation litigation, courts have the discretion to consolidate claims when appropriate, including collateral attacks brought by absent class members. See Davis v. Board of Sch. Comm'rs, 517 F.2d 1044, 1049 (5th Cir. 1975) ("our policy of required intervention is analogous to the discretionary power in the court to require consolidation [under Federal Rule of Civil Procedure 42(a)]").

Second, and perhaps of equal importance, school desegregation cases feature a factual distinction from Hansberry and its progeny: the desegregation programs which the collateral plaintiffs are attacking all are active, viable cases that remain under the jurisdiction of the district court. E.g., Rivarde, 930 F.2d at 641; Miller, 667 F.2d at

947; Hines, 479 F.2d at 764. Hansberry and Gonzales, on the other hand, involve collateral plaintiffs challenging the final judgments entered in class actions that had been terminated and in which no actions would be taken by the court in the future. Hansberry, 311 U.S. at 39; Gonzales, 474 F.2d at 71. The collateral plaintiffs in Hansberry and Gonzales thus had no viable cases in which to intervene because the final relief already had been ordered on their behalf and the case files had been closed. In comparison, collateral plaintiffs in a desegregation case have a viable, pending action in which to seek relief.

The Court therefore concludes that Hines and its progeny can be boiled down to the following proposition: when absent members of a class of school desegregation plaintiffs seek to challenge an actively administered desegregation plan in a collateral action, the collateral action should be dismissed so that the class members can petition to intervene in the existing desegregation action. The dismissal is on procedural, rather than substantive, grounds and should not be interpreted in any way as an assessment of the merits of the class members' claims.

This conclusion has been applied by courts in the Eleventh Circuit and beyond with little fanfare. In Mannings v. School Bd. of Hillsborough County, 796 F. Supp. 1491 (M.D. Fla. 1992), the district court enjoined state administrative proceedings because the state proceedings challenged an established desegregation plan that was being administered in an existing federal lawsuit. 796 F. Supp. at 1497. The court instead required the state plaintiffs to file a petition in the federal court administering the desegregation plan for leave to intervene in that action. Id.; see also Jones v.Caddo Parish Sch. Bd., 735 F.2d 923, 947 (5th Cir. 1964) (Higginbotham, J., dissenting) (observing that, although class member has right to file

collateral attack on desegregation order, the "preferred course of action" is to intervene in a pending action rather than file a separate lawsuit); Davis, 517 F.2d at 1046 ("[T]his court (has) held that the proper and orderly procedure to be followed by third parties in seeking to question deficiencies in the implementation of desegregation orders or for further relief in ongoing school cases is by petition to intervene."); Harris v. Birmingham Bd. of Educ., 90 F.R.D. 263, 265 (N.D. Ala. 1981) (denying class certification motion because "the appropriate vehicle" for the plaintiffs' claims "is not a separate class action, but a complaint in intervention timely filed in the (original desegregation] case."); cf. United States v. Franklin Parish Sch. Bd., 47 F. 3d 755, 757 (5th Cir. 1995) (relying upon Hines to assess the propriety of allowing a group of class members to intervene in the original desegregation case).

Factually, the Tompkins case provides an ideal opportunity to apply the principles recognized in Hines, Miller, and Rivarde. The Court continues to assert active jurisdiction over the Knight case, with the assistance of a Court-appointed Monitor and a Court-appointed Oversight Committee who meet regularly. All of the parties who would be required for a full adjudication of the issues raised by the Tompkins Plaintiffs are present and actively involved in the Knight case. The Court's activity in the Knight case thus is ongoing, as it continues to oversee the remedial effectiveness of the desegregation efforts in general and the use of "other race" scholarships in particular. Indeed, the Court recently ordered its Monitor to review the "other-race" scholarship programs at both ASU and Alabama Agricultural and Mechanical University ("AAMU") and report on whether the scholarships are achieving the purpose for which they were created. Knight, No. 83-M-

1676, slip op. at 1-2 (N.D. Ala. Jan. 12, 1998).[5] The Monitor reported to the Court that he and the Oversight Committee visited both ASU and AAMU and reviewed the scholarship programs with university officials. The Court expects to receive a report from the Monitor shortly.

Given these circumstances, there exists an active, viable lawsuit in which the Tompkins Plaintiffs are able to seek intervention and present their claims. The judicial economy arguments addressed in Hines, Miller, and Rivarde apply with particular force here. The litigation of a collateral challenge to the ongoing Knight litigation would drain the resources of the parties and the Court. This result is inefficient and inappropriate given that a far more practical route already exists.

The Tompkins Plaintiffs argue that dismissing their lawsuit would toll the death knell of the due process rights for absent class members recognized in Hansberry. The Court disagrees. First, unlike the collateral plaintiffs in Hansberry, the Tompkins Plaintiffs still have a viable legal forum in which to present their claims. The absent class members simply must satisfy the requirements imposed on all litigants who wish to intervene in pending class litigation, which courts uniformly have agreed is sufficient to protect the constitutional rights of absent class members.

Furthermore, the due process rights of the absent class members receive no greater protection in a collateral lawsuit than they receive as an intervenor in the pending desegregation case. A collateral attack on a class judgment inquires whether the class representatives have fairly and adequately represented the interests of the absent class

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[5] A copy of the Court's January 12, 1998, Order in the Knight case was placed into the record of this case.

members. Gonzales, 474 F.2d at 72. "The primary criterion ... is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class." Id. at 73. This examination essentially mirrors an assessment of an absent class member's eligibility to intervene in existing desegregation litigation:

> The [petitioners] would bring to the attention of the district court the precise issues which the [petitioners] sought to represent and the ways in which the goal of the unitary school system had allegedly been frustrated. The district court ... then determined whether these matters had been previously raised and resolved and/or whether the issues sought to be presented by the [petitioners] were currently known to the court and parties in the initial suit. If the court determines that the issues the [petitioners] sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the [petitioners] it could deny intervention. If the court felt that the [petitioners] had a significant claim which [they] could best represent, intervention would be allowed.

Hines, 479 F.2d at 765 (emphasis added). Hence Hines and Gonzales both measure the competency of representation by the class representatives on the issue presented by the collateral plaintiffs; if the representation failed to protect the collateral plaintiffs' due process rights, the collateral plaintiffs are permitted to raise the issue anew in the appropriate legal forum. See Davis, 517 F.2d at 1049 ("Intervention would not result in the loss of substantive or procedural rights.").

C. Summary

For the reasons set forth above, the Court concludes that the most appropriate course of action is to exercise its discretionary authority to dismiss Plaintiffs' case with leave to petition for intervention in Knight. Hines, 479 F.2d at 765; Miller, 667 F.2d at 948-49; Rivarde, 930 F.2d at 642-43; Mannings, 796 F. Supp. at 1497; Harris, 90 F.R.D. at 265. If Plaintiffs wish to challenge the legality of the "other race" scholarship program at ASU, or at any other public university in Alabama, they must request to intervene in the Knight litigation pursuant to Federal Rule of Civil Procedure 24 and other relevant authority.

As discussed above, the Court's conclusion is premised upon concerns of judicial economy, efficiency, and fairness to all parties interested in the outcome of this case. The Court expresses no opinion regarding the merits of Plaintiffs' claims; similarly, the Court does not reach the validity of the many defenses proffered by Defendants and the Knight Plaintiffs, including Plaintiffs' lack of standing[6] and res judicata. All these issues remain to be litigated and resolved if and when the Tompkins Plaintiffs move to intervene in the Knight litigation,

III. Conclusion

ACCORDINGLY, the Court **GRANTS** Defendant State of Alabama's Motion to Dismiss and GRANTS Defendants Alabama State University Board of Trustees, et al.'s Motion to Dismiss. The Court **DISMISSES** this case

---

[6] For a discussion regarding a party's standing under Article III when considered in the context of a request to intervene under Rule 24, see Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1512 n.4 (1996), and Chiles v. Thornburgh, 865 F.2d 1197, 1212 (11th Cir. 1989).

with leave for Plaintiffs to file a motion to intervene in Knight v. Alabama, No. 83-M-1676 (N.D. Ala.). All other pending motions in this case are **DENIED AS MOOT.**

The Court further **DIRECTS** the Clerk to file a copy of this Order in the record in the Knight case, and to serve a copy of this Order upon all parties in the Knight case.

IT IS SO ORDERED, this the 28th day of April, 1998.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX C

C1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT. JR., et al.,
and THE UNITED STATES OF AMERICA,

Plaintiffs and Plaintiff -Intervenors

v.

CIVIL ACTION
CV83-M-1676-S

THE STATE OF ALABAMA, et al.,

Defendants

[Entered on Dec. 30, 1991; N.D. Ala.]

ORDER

On June 13, 1990, this Court granted the motion of plaintiffs, John F. Knight, Jr., et al., for class recertification and conditionally certified a class of plaintiffs under Federal Rule of Civil Procedure 23(b)(2).

The class conditionally certified by the Court's order of June 13, 1990, is hereby unconditionally certified pursuant to Federal Rule of Civil Procedure 23(b)(2) and defined as: all black citizens of the State of Alabama and all past, present and future students, faculty, staff and administrators of Alabama State University and Alabama A&M University.

IT IS SO ORDERED, this the 27th day of December, 1991.

/s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR., ET AL.,
Plaintiffs and
Plaintiff Intervenors,

UNITED STATES OF AMERICA,
Plaintiff,

CIVIL ACTION NUMBER
CV-83-M-1676-S

v.

THE STATE OF ALABAMA, ET AL.,
Defendants.

[Filed and Entered on Sept. 6, 1996; N.D. Ala.]

ORDER

The Court has before it the motion of Alabama State University for the approval of its Diversity Scholarship Program. In addition to seeking approval for an undergraduate Diversity Scholarship Program, ASU is also petitioning the Court to amend the August 1, 1995 Decree and permit the University to award diversity scholarships to graduate students. The United States and the State Defendants have responded.

The Oversight Committee has reviewed both the undergraduate and graduate diversity scholarship proposals. The Court Monitor reports that based on the Oversight Committee's review, that certain changes were suggested to

University administrators. According to the Monitor, those changes have been incorporated into the proposals now before the Court.

Undergraduate Diversity Scholarship Proposal

The undergraduate diversity scholarship proposal attached as Exhibit One to ASU's Motion for Approval of Diversity Scholarship Programs, appears consistent with the requirements of the 1995 Decree and will be approved. A copy of the undergraduate diversity scholarship proposal is attached hereto and incorporated. The University shall administer the scholarship program consistent with the proposal now approved and the requirements of the 1995 Decree as amended.

Graduate Diversity Scholarship Proposal

ASU moves the Court to amend the 1995 Decree to permit the University to award graduate scholarships as part of its Diversity Scholarship Program. Both the United States and the State Defendants direct their comments to this issue. Neither the United States nor the State Defendants opposed the expansion of the Diversity Scholarship Program to include graduate students.

ASU and the State Defendants apparently agree that the Diversity Scholarships Program should be primarily targeted toward undergraduates and therefore the funds available for graduate diversity scholarships should not exceed 35% of the scholarship funds annually available. The Court concurs that a 35/65 percent split between graduate and undergraduate scholarship assistance is acceptable. The Court will grant the motion to amend the August 1, 1995 Decree.

The primary focus of ASU's Diversity Scholarship Program must remain on undergraduates. To that end, in addition to maintaining a 35/65 percent split, the University shall annually report on whether undergraduates otherwise eligible for diversity scholarship assistance, and seeking such assistance, were refused aid because of a lack of funds in the program. If it develops that otherwise qualified undergraduates are being denied diversity scholarships because of a lack of funds, then the Court reserves the right to reduce the percentage of such funds available to graduate students. In its annual report regarding the number of diversity scholarship recipients, the University shall also designate whether the recipient of the aid is an undergraduate or graduate student.

The requirements for the receipt of a graduate diversity scholarship are set out in a portion of the University's July 3, 1996 brief. That portion of the University's brief is attached hereto and incorporated.

ACCORDINGLY, the motion of Alabama State University to approve its Undergraduate Diversity Scholarship Program is GRANTED. The request to Amend the August 1, 1995 Decree to provide for a Graduate Diversity Scholarship Program is also GRANTED and the University is authorized to institute such a program consistent with the restrictions noted above. Both Diversity Scholarship Programs are to be administered consistent with this Order and the requirements of the August 1, 1995 Decree as amended.

IT IS SO ORDERED this the 6th day of September 1996.

/s/
HAROLD L. MURPHY, JUDGE
UNITED STATES DISTRICT COURT

SCHOLARSHIP PROGRAMS FOR WHITE UNDERGRADUATE STUDENTS

ALABAMA STATE UNIVERSITY

MONTGOMERY, ALABAMA

GENERAL INFORMATION ABOUT SCHOLARSHIPS FOR WHITE UNDERGRADUATE STUDENTS (ALABAMA RESIDENTS)

Alabama State University scholarships are offered to the most outstanding entering freshman and college transfer students. All scholarships are competitive and are awarded to the most qualified students on the basis of completed admission and scholarship applications and official high school transcripts. Scholarships are also awarded to the most qualified college transfers on the basis of completed admission and scholarship applications and official college transcripts.

The payment of room and/or board charges under any scholarship program is restricted to on-campus housing and food services.

PRESIDENTIAL SCHOLARSHIP

Freshmen: A high school applicant must have a grade point average of 3.76 or above, on a 4.0 scale, in academic subjects or an ACT score of 27 or above (comparable SAT score of 1210 or above).

College Transfer Students: A college transfer applicant must have a grade point average of 3.76 or above, on a 4.0

scale, after completion of 24 semester hours (36 quarter hours) of credit. Applicants must transfer from an accredited college.

The Presidential Scholarship pays full tuition, books, fees, and (for on-campus students only) room and board for a maximum of eight semesters for freshmen and a maximum of six semesters for college transfer students. Also, $900 annually is provided for incidentals. Scholarships are renewable annually based on completion of 24 semester hours with a minimum cumulative grade point average of 3.0

ACADEMIC SCHOLARSHIP

Freshmen: A high school applicant must have a minimum grade point average within the range of 3.00-3.75, on a 4.0 scale, in academic subjects or an ACT score of 21-26 (comparable SAT score of 990-1180).

College Transfer Students: A college transfer applicant must have a grade point average within the range of 3.00-3.75, on a 4.0 scale, after completion of 24 semester hours (36 quarter hours) of credit. Applicants must transfer from an accredited college.

The Academic Scholarship pays full tuition, book, fees, and (for on-campus students only) room and board for a maximum of eight semesters for freshmen and a maximum of six semesters for college transfer students. Scholarships are renewable annually based on completion of 24 semester hours, with a minimum cumulative grade point average of 3.0.

MINORITY TUITION SCHOLARSHIP

Freshmen: A high school applicant must have a minimum cumulative grade point average of 2.0 on a 4.0 scale. Applicants must be residents of Alabama. All applicants must submit completed admission and scholarship applications, an

official high school transcript or General Education Development (GED) certificate, and an official ACT score (or comparable SAT scores), if a full-time student (12-18 hours). A part-time student (less than 12 hours) must submit an application for undergraduate admissions, a scholarship form, and an official highschool transcript or GED certificate.

College Transfer Students: An applicant must submit completed admission and scholarship applications and an official college transcript. An applicant also must be a resident of Alabama and have a minimum cumulative grade point average of 2.0, on a 4.0 scale. Applicants must transfer from an accredited college.

The Minority Tuition Scholarship pays tuition, books, course materials and fees incident to taking of a course or courses for degree-seeking students. Scholarships are renewable at the completion of each semester based on a minimum cumulative grade point average of 2.0

SPECIAL NOTE: A resident for the purpose of these scholarships and for eligibility to receive the same must be a person who has graduated form a public or private high school in Alabama or has at least one parent or guardian residing in Alabama at the time of receiving the scholarship. No student receiving such scholarship shall receive scholarship assistance for more than seven years after the receipt of first such scholarship award.

THE UNIVERSITY RESERVES THE RIGHT TO REVISE THE CRITERIA SUBJECT TO APPROVAL OF THE UNITED STATES DISTRICT COURT IN KNIGHT V. STATE OF ALABAMA, CV-83-M-1676-S.

APPLICATION DEADLINE: FEBRUARY 15
APPLYING FOR FALL 19____

Please check type of Award/Scholarship for which you qualify:

❑ Presidential ❑ Academic ❑ Minority Tuition

PLEASE PRINT OR TYPE

Name _____

Race _____

Street Address _____

Telephone Number ( ) _____ S.S. #_____

City _____ State_____ Zip Code_____

Name of High School _____

Name of Counselor _____

Name of Principal _____

Self Estimate of G.P.A. ____ Composite ACT/SAT _____

Graduation Date _____

TRANSFER STUDENTS ONLY

Name of College Attended _____

City _____ State_____ Zip Code_____

Self Estimate of G.P.A. ____ Hours Completed _____

Date(s) Attended _____

Please list (on separate sheet) high school or college activities, honors and community activities. All scholarships are competitive with annual renewal based on maintaining scholarship requirements and continuous state funding.

Signature _____

OFFICE USE ONLY

ACTION:

❑ RECEIVED ❑ SUBMITTED DATE _____

❑ APPROVED ❑ NOTIFIED DATE _____

REQUIRED TO EVALUATE COMPLIANCE WITH THE COURT ORDER IN KNIGHT V. STATE OF ALABAMA

Alabama State University

FOR MORE INFORMATION CONTACT:

OFFICE OF ADMISSIONS AND RECRUITMENT
ALABAMA STATE UNIVERSITY
Post Office Box 271
Montgomery, AL 36101-0271
(334) 229-4291 or 1-800-253-5037

in detail in the bulletin attached hereto as Exhibit 1.

Persons interested in applying for an undergraduate diversity scholarship must submit a completed Application For Scholarship in the time indicated on the Application For Scholarship form.

GRADUATE DIVERSITY SCHOLARSHIP PROPOSAL:

ASU proposes that the Decree be amended to allow the offering of graduate diversity scholarships to attend the main campus of ASU at Montgomery. Several reasons support this proposal:

> (1) ASU's recent experience has clearly demonstrated that its efforts to attract white students can be especially successful at the graduate level;
>
> (2) Some of the new programs contemplated in the Remedial Decree are at the graduate level, and thus will depend for their success an ASU's ability to attract graduate students;
>
> (3) Since many graduate students take less than a full course load, the cost of graduate scholarships can be relatively low, which means that more students can be funded;
>
> (4) The presence of graduate students on campus contributes to the "critical mass" and significantly

increases the probability of success in recruiting full-time undergraduate white students.

An applicant for the graduate minority scholarship must have an undergraduate GPA of 3.0 or better; an acceptable score on the appropriate admissions test; passage of the Alabama State University Written Competency Examination, and must submit two (2) letters of recommendation from undergraduate or other university teachers who are qualified to evaluate academic potential.

A student admitted to the graduate school with less than a 3.0 undergraduate GPA may qualify for a graduate diversity scholarship upon attaining a 3.0 GPA in the graduate courses or programs.

In order to retain the graduate diversity scholarship, the graduate student is required to maintain as a minimum, a 3.0 grade point average during each term of enrollment.

The graduate diversity scholarship pays tuition, fees and books for courses and programs pursued on the main campus of Alabama State University at Montgomery, Alabama.

Respectfully submitted,

/s/

Solomon S. Seay, Jr.
524 South Union Street
Montgomery, Alabama 36104.
(334) 834-2000

D12

Fred Gray
P.O. Box 239
Tuskegee, Alabama 36083

Armand Derfner
P.O. Box 600
Charleston, SC 29402

Terry G. Davis
4183 Carmichael Road
Montgomery, Alabama 36106

ATTORNEYS FOR DEFENDANT
ALABAMA STATE UNIVERSITY

APPENDIX E

E1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JESSIE TOMPKINS, ET AL,

Plaintiffs,

CIVIL ACTION NUMBER:
97-CV-1482

ALABAMA STATE UNIVERSITY
BOARD OF TRUSTEES, ET AL.

Defendants. **[Filed and Entered on Dec. 1, 1997; N.D. Ala.]**

ORDER

I
a

The Court has reviewed the Plaintiffs' brief in opposition to the pending motions to dismiss the Second Amended Complaint and is left with the conviction that the Plaintiffs need to more carefully review the record in Knight v. Alabama before responding. The brief contains a factual flaw that renders much of its argument useless to the Court.

The Plaintiffs have made the erroneous assumption that the 1995 Remedial Decree is a consent decree entered into between the Plaintiffs and the various Defendants in the Knight case. Nothing could be further from the truth. The 1995 Decree, as with its predecessor the 1991 Decree, is a judicially crafted remedial obligation and injunction

imposed on the Knight Defendants by the Court after extensive evidentiary hearings and subsequent findings of fact. The parties were never asked to consent to the requirements of the 1995 or 1991 Decrees, they were simply directed to comply. The fact that all of the parties who filed appeals following the 1995 decision later decided to dismiss their pending appeals does not change an injunction and remedial decree into a "consent decree."

The findings of fact that support the 1995 Remedial Decree are set out in the 1991 and 1995 reported decisions.[1] Many of the cases cited by the Plaintiffs and much of their argument concerns the validity of collateral attacks on class actions settled by consent decrees. Those cases need to be reviewed for relevancy and the Plaintiffs arguments recast if the Plaintiffs' briefing is to be of any use to the Court.

The Plaintiffs in their first footnote state that they "have been able to locate no final[] or unconditional certification of the 'conditionally certified' class in the hundreds of pages of legal opinions issued in the Knight v. Alabama." The Plaintiffs then conclude their footnote by asserting that if the class was never finally certified, that the "Defendants' spurious procedural argument for dismissal is completely irrelevant."

The Plaintiffs grossly underestimate the number of pages of legal opinions issued in the Knight case. Within the thousands of pages of legal opinions is an Order dated

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[1] The 1991 Findings of Fact reported in Knight v. State of Alabama, 787 F. Supp. 1030, 1061-1343 (N.D. Ala. 1991) are fully binding on the parties and support the 1995 Decree unless they are inconsistent with the Findings of Fact announced by the Court in 1995, or were reversed by the Eleventh Circuit on appeal in Knight v. State of Alabama, 14 F.3d 1534 (11th Cir. 1994). See Knight v. State of Alabama, 900 F. Supp. 272, 374 (N.D. Ala. 1995).

December 30, 1991, that unconditionally certified the plaintiff class in the Knight case. The Order fully certifying the class is docketed an page 150 of the Civil Docket Sheet and designated as document 1559.

It will behoove the Plaintiffs to take the time to better familiarize themselves with the procedural and factual history of the Knight case if they intend to creditably challenge a portion of the current Knight Decree.

In order for the Plaintiffs' briefing to be of use to the Court it must be constructed in the proper factual context and the precedents cited must be relevant to the legal issues that control the disposition of the issue before the Court. The Plaintiffs shall revise their argument to appropriately reflect the facts as they actually exist and review their citation of authority to confirm its relevance. The Plaintiffs shall resubmit their brief on or before December 12, 1997.

b

If the Plaintiffs' initial submission is any indication, they apparently intend to defend against the pending motions to dismiss based in part on a claim that the Knight class was inadequately represented during the course of the Knight litigation. So that the Court has the benefit of the fullest possible briefing an this matter, it directs counsel for the Plaintiffs to serve counsel for the Knight Plaintiffs with its revised submission at the same time the Defendants are served. The Knight Plaintiffs are represented by James U. Blacksher, Esq. Title Building, Suite 710, 300 21st Street, Birmingham, Alabama 35203. The Knight Plaintiffs shall file their response on or before December 23, 1997, and shall file as *amicus curiae*.

II

The Court has before it the Plaintiff Tompkins' motion to amend the Second Amended Complaint to add a third count challenging the adequacy of Alabama State University's ("ASU") policies and procedures governing student elections. Plaintiff Tompkins has also filed a motion to sever the proposed third count from the Compliant [sic] and to transfer it back to the United States District Court for the Middle District of Alabama.

No opposition to either of the motions has been filed. The Court will grant the motion to amend the Complaint to add a third count and also grant the motion to transfer the third count to the United States District Court for the Middle District of Alabama.

Mr. Tompkins' claims concerning student elections do not relate to the general challenge to the use of Court-ordered scholarships as part of the 1995 Decree in Knight v. Alabama. The Plaintiffs' case was originally transferred from the Middle District to the Northern District because it attacks the validity of the scholarship provisions in the 1995 Knight Decree. Those counts in the Plaintiffs' Complaint that question the constitutionality of the Court-ordered scholarships are appropriately before this Court. Mr. Tompkins' unrelated issues concerning student elections at ASU should be heard in the Middle District of Alabama where venue is proper and where all the involved parties, witnesses and evidence are located.

ACCORDINGLY, the Plaintiffs shall resubmit their brief in opposition the Defendants' motion to dismiss in accordance with the procedure outlined above. Plaintiff Tompkins' motion to amend the second amended complaint to add a third count is granted, and the Clerk shall transfer

the third count to the United States District Court for the Middle District of Alabama.

IT IS SO ORDERED this the 1st day of December 1997.

/s/
HAROLD L. MURPHY, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN F. KNIGHT, JR., ET AL.,
Plaintiffs and
Plaintiff Intervenors,

UNITED STATES OF AMERICA
Plaintiff,

CIVIL ACTION NUMBER:
CV-83-M-1676-S

v.

THE STATE OF ALABAMA, ET AL.,
Defendants.

[Filed and Entered on Oct. 29, 1998; N.D. Ala.]

ORDER

I.

This matter is before the Court on the motion of Jesse Tompkins, *et al.* to intervene in this fifteen-year-old desegregation case. (Hereinafter "Applicants for Intervention" or "Applicants") The Applicants for Intervention are African-American students at Alabama State University ("ASU") who wish to challenge the portion of the Court's 1995 Remedial Decree (the "1995 Decree") establishing diversity scholarships for students attending ASU.

On May 1, 1998, the Court dismissed the Applicants' attempt to challenge ASU's diversity scholarship program through a separate and independent action. Tompkins, et al. v. Alabama State University, et al., No. CV-97-M-1482-S (N.D. Ala. May 1, 1998). The Court dismissed the action because it constituted an impermissible collateral attack on the 1995 Decree. In dismissing the action, the Court suggested that if the Applicants wished to challenge ASU's diversity scholarship program, the appropriate procedure for them to follow was to seek intervention in the *Knight* case.

The Applicants for Intervention appealed the May 1 dismissal of their collateral action to the Eleventh Circuit. That appeal is now pending. On July 10, 1998, the Applicants filed their Motion to Intervene.

The Applicants for Intervention currently are unnamed class members represented in the *Knight* case by the Knight Plaintiffs.

II.

Several of the Defendants, the Knight Plaintiffs, and The United States have responded to the Motion to Intervene. Many of the responding parties oppose the motion outright on grounds that the Applicants for Intervention cannot satisfy the requirements of Rule 24(a) or 24(b) of the Federal Rules of Civil Procedure. Other responding parties suggest that the Court should conduct an evidentiary hearing, preceded by an opportunity for discovery before deciding whether the proposed Applicants for Intervention satisfy the requirements of Rule 24.

In their Reply in Support of the Motion to Intervene, the Applicants for Intervention contend that they are

entitled to intervene based on the allegation made in the proposed Complaint In Intervention without the need for discovery or an evidentiary hearing. They do, however, note that "if the Court is inclined to grant discovery, then Applicants also request an opportunity to take discovery before the Court rules on the Motion to Intervene." (See "Reply in Support of Motion to Intervene," at p.3.)

The Court will permit the parties in the *Knight* case, as well as the Applicants for Intervention to conduct discovery on the limited question of whether the proposed Complaint In Intervention states a cause of action authorizing intervention under Rule 24. At a minimum, the Applicants are entitled to attempt to show that the claims they wish to litigate have not been or are not being litigated or that the interests they seek to assert have not been or are not being adequately represented by the Knight Plaintiffs. See Bradley v. Pinellas County School Board. et al., 961 F.2d 1554, 1556-57 (11th Cir. 1992).

III.

Though none of the parties have raised the issue, the Court is aware that its authority to order discovery - particularly interrogatories and depositions - against absent class members is limited. Generally, to order discovery against absent class members, the Court must find that special circumstances exist, In re Carbon Dioxide Antitrust Litigation, 155 F.R.D. 209, 212 (M.D. Fla. 1993) and that the discovery is not intended to harass the absent class members. Feldman v. Motorola, Inc. No. 90-C5887, 1992 WL 415382 at *6 (N.D. Ill. Nov. 5, 1992). In this case, special circumstances are readily apparent and because the Court will limit the range of discovery, any harassment of the Applicants or the parties now actively involved in the *Knight* case should not be a concern.

The Applicants for Intervention are not simply idle class members but rather, persons who hope to challenge aggressively what they maintain is an unfair and unlawful provision of the 1995 Decree. They assert among other claims, a claim that class counsels' representation of the Knight Plaintiffs was inadequate because class counsel failed to oppose the diversity scholarship program at ASU.

The initial discovery which the Court will permit will be limited to the factual issues that must be resolved in order for the Court to rule on the Motion to Intervene. The Court will not permit this phase of discovery to become a broad-based inquiry. That having been said, however, the parties and the Applicants for Intervention will have to respond to appropriate discovery requests relating to the possible factual issues the Court must resolve in order to rule on the pending Motion. In the event the Court grants the Motion, the right to the more expansive discovery contemplated by the Rules of Civil Procedure will be allowed.

ACCORDINGLY, the Court DEFERS ruling on the Motion to Intervene and ORDERS a discovery period of three months, to commence twenty days after the date this Order is docketed. Discovery shall be limited to those issues relevant to the Motion to Intervene and opposition thereto. Discovery may be conducted by and against the Applicants for Intervention.

Pursuant to Federal Rules of Civil Procedure 33(b)(3) and 34(b), the period for responding to written discovery shall be shortened to twenty days. The Court DIRECTS the Knight Plaintiffs to review the proposed interrogatories attached to their Response to the Motion to Intervene to ensure that the interrogatories comport with the

discovery restrictions contained in this Order. Any discovery disputes shall be first presented to the Special Master and Monitor and if he is unable to resolve the dispute, he will submit the matter to the Court together with his recommendation

Thirty days after the conclusion of the discovery period, the Applicants for Intervention shall resubmit their Motion to Intervene augmented as appropriate with the fruits of their discovery efforts. Any party wishing to respond to the renewed Motion must do so within twenty days. The Applicants will have twenty days to reply if they so desire. After the resubmission of the Motion and any responses thereto, the Court will decide whether a bearing is necessary.

The Court will send a copy of this Order to counsel for the Applicants in Birmingham, Alabama. In addition to filing matters with the Clerk's office in Birmingham, counsel for the Applicants must also send copies of any motions and briefs filed on their behalf of the Applicants for Intervention in this action directly to the Court at the following address: P.O. 53, Rome, Georgia, 30162. Because the Court is not resident in Alabama, that is the only way to ensure that the Court receives all appropriate papers.

IT IS SO ORDERED this the 27th day of October 1998.

/s/

HAROLD L. MURPHY, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO.
97-M-1482-2
[Transferred from Middle District of
Alabama, C.A. No. CV-97-T-471-N]

JESSIE TOMPKINS, and all other members of a race or ethnic group other than white similarly situated.

Plaintiff,

vs.

ALABAMA STATE UNIVERSITY BOARD OF TRUSTEES; State of Alabama; Dr. William H. Harris, President of Alabama State University; Dr. Roosevelt Steptoe, President of Academic Affairs, Director of Student Activities; Ex-Officio President; Joe L. Reed, Chairman; Governor Fob James, Ex-Officio President; Joe L. Reed, Chairman; Frankye U. Underwood, Vice Chairwoman; Richard Arrington, Jr.; B. Maxine Corley; James C. Cox; LaRue W. Harding; Toreatha M. Johnson; Larry H. Keener; Patsy D. Parker; Donald V. Watkins; all individuals are named in their individual and official capacities,

Defendants.

SECOND AMENDED COMPLAINT

Nature of the Action

1. This is a class action brought for violations and threatened violations of the rights of the Plaintiffs and the class they represent to equal protection of the laws under the Fourteenth Amendment to the United States Constitution. and for racial discrimination in violation of 42 U.S.C.§§ 1981, 1983 and 2000d et seq. Plaintiffs seek declaratory and injunctive relief and compensatory and punitive damages in an amount to be proven at trial.

Jurisdiction and Venue

2. This Court has jurisdiction of the action under 28 U.S.C. section 1331 and 1343. This action arises under the Fourteenth Amendment to the United States Constitution, and under federal laws, 42 U.S.C. section 1981, 1983 and 2000d et seq.

3. Venue in this Court is proper under 28 U.S.C. section 1391 and this Court has personal jurisdiction over the Defendants sued in their personal capacities in this matter because the events giving rise to this claim occurred in this district.

Plaintiffs

4. Plaintiff Jessie Tompkins is, and at all times relevant to this litigation was, a resident of the State of Alabama.

5. Tompkins received a Graduate Assistantship for two years, pursuant to which he was awarded between $3,600 and $6,100 for tuition and was required to perform 20 to 25 work hours per week. In the Fall of 1995, ASU refused to renew his Assistantship. Tompkins was

informed by defendants, Dr. Steptoe and graduate school coordinator, Mollie Reed, that he could no longer receive a scholarship because the University was required to recruit more white students and that the scholarship money was needed for the whites-only Diversity Scholarship.

6. The "Diversity Scholarship" is a student scholarship offered by Alabama State University (ASU). The eligibility requirements for the "Diversity Scholarship" are: the student must have a Grade Point Average (G.P.A.) of 2.0 or above, and the student must be"white."

7. Tompkins attempted to apply for a Diversity Scholarship in 1995, but was informed that the would not be eligible because he was black.

8. Audra Beasley is, and at all times relevant to this litigation was, a resident of the State of Alabama.

9. Beasley received a Pell Grant and Work Study Scholarship form ASU for two years. In the Fall of 1996, Beasley applied for a Teacher Education Scholarship, but was told there were no funds available for the scholarship.

10. Beasley attempted to apply for a Diversity Scholarship in 1997, but she never received a reply. Beasley was not eligible because she is black.

11. James W. Scott, and at all times relevant to this litigation was, a resident of the State of Alabama.

12. Scott applied for a Teacher Education Scholarship in 1995, 1996, and 1997. Despite an outstanding G.P.A. of 3.5, he receives no scholarship money from ASU. He was told his scholarship was denied because no money was available.

13. Scott would have applied for a Diversity Scholarship in 1997, but he is not eligible because he is black.

14. Rodney Smith is, and at all times relevant to this litigation was, a resident of the State of Alabama.

15. Smith was denied a Pell Grant at ASU, but granted a Pell Grant by Auburn University.

16. Smith attempted to apply for the Diversity Scholarship in 1997, but was not permitted to do so because he is black.

Defendants

17. Alabama State University is a public educational institution in the State of Alabama.

18. Alabama State Board of Trustees, governs Alabama State University. The Board has specific statutory authority to set scholarship standards at its institution.

19. Dr. William H. Harris, is Secretary of the Board of Trustees, Chief Executive Officer and President of Alabama State University.

20. Defendant, Dr. William H. Harris, possesses the authority to execute the policies and rules adopted by the Board of Trustees with respect to the government of Alabama State University.

21. Roosevelt Steptoe, is President of Academic Affairs, and as such has authority over graduate student scholarship awards.

22. Governor Fob James, Ex-Officio President; Joe L. Reed, Chairman; Frankye U. Underwood, Chairwoman; Richard Arrington, Jr.; B. Maxine Corley; James C. Cox; LaRue W. Harding; Toreatha M. Johnson; Larry H. Keener; Patsy B. Parker; and Donald V. Watkins are members of the Board of Trustees of Alabama State University.

23. Plaintiffs bring this action as a class action pursuant to Rules 23(a), 23(b)(2), 23(b)(3) and 23(c)(4)(A) of the Federal Rules of Civil Procedure on behalf of a class (the "Class") consisting of all students who:

- would have applied for the "Diversity" scholarship at Alabama State University had they not been ineligible on account of their race; and
- were members of those racial or ethnic group, including African American, that Defendants made ineligible for the "Diversity" scholarship.

24. Plaintiffs seek to maintain this class, pursuant to Rule 23(c)(4), on the issue of whether Defendants engaged in unlawful discrimination.

25. The Class is so numerous that joinder of all its members is impracticable.

26. Common questions of law and fact exist as to all members of the Class. Among the questions of law and fact common to the Class is whether Defendants violated the Fourteenth Amendment to the United States Constitution and federal laws, 42 U.S.C. §§1981, 1983, and 2000d et seq., by discriminating and by conspiring to discriminate against certain applicants on the basis of race.

27. Plaintiffs' claims are typical of the claims of the members of the Class and they are adequate representative of the Class. Plaintiffs and members of the Class have sustained damages because of Defendants' unlawful activities alleged herein. Plaintiffs have retained counsel competent and experienced in race discrimination litigation and intend to prosecute this action vigorously. Plaintiffs will fairly and adequately protect the interests of the Class.

28. A class action is superior to other available means for the fair and efficient adjudication of the controversy.

Facts

29. Alabama State University is a State-run school which also receives federal funds.

30. In the Fall of 1992, plaintiff Tompkins was awarded a Graduate Assistantship from ASU, which was renewed the following year.

31. The minimum eligibility requirements for a Graduate Assistantship include a Grade Point Average of at least 3.0.

32. Applicants selected for Graduate Assistantship are awarded between $3,600 and $6,100 per year from which tuition must be paid and are required to perform 20 to 25 work hours per week.

33. In the Fall of 1995, plaintiff Tompkins attempted to renew his Graduate Assistantship. The graduate school coordinator. Molly Reed, informed Tompkins that the Assistantship could not be renewed

because funds for the Graduate Assistantship were needed for "Diversity Scholarships."

34. Soon thereafter, plaintiffs, Tompkins, Beasley and Smith attempted to apply for the "Diversity Scholarship" at ASU.

35. The requirements of the "Diversity Scholarship" are that applicants are white and have a Graduate Equivalency Degree or a High School Degree with a minimum of G.P.A. of 2.0.

36. The "Diversity Scholarship" application form states on the cover: "Diversity Scholarship Program For Undergraduate and Graduate (White) Students."

37. Applicants selected for the "Diversity Scholarship" are awarded full financial support for seven years, including room and board, books, life and health insurance, property damage fees, and student activity fees, and other monetary benefits.

38. Admissions Officials refused to give Plaintiffs applications for the "Diversity Scholarship," explaining that Plaintiffs were not eligible for the scholarship because of their race.

39. Plaintiff Tompkins requested the permission of Roosevelt Steptoe, President of Academic Affairs, to apply for a "Diversity Scholarship" because of his race.

40. As a result, plaintiffs Tompkins did not apply for the "Diversity Scholarship."

41. Without a scholarship, plaintiff Tompkins was unable to afford to continue his studies in the Fall of 1995.

Tompkins took a job with the United Parcel Service from the fall of 1995 to the Fall of 1996. In the Fall of 1996, Tompkins returned to his studies at Alabama State University as a part time student, while continuing to work at United Parcel Service.

42. Audrey Beasley, James W. Scott, and Rodney Smith are undergraduates at Alabama State University. All have attempted to apply, or would have applied, for Diversity Scholarships at ASU, but were ineligible because they are not of the required race. All have suffered financial hardships because of their race.

43. Plaintiffs, and the class they represent categorized as nonwhite, were not among the favored racial group eligible for the "Diversity Scholarship."

44. Race was one of two factors used for determining eligibility for the "Diversity Scholarship."

45. Assuming arguendo that Defendants had a compelling interest for which they used race in their scholarship criteria. Defendants did not consider, and never employed any race neutral alternative to achieve that interest.

46. As a result of Defendants' racially discriminatory scholarship, each of the plaintiffs suffered humiliation, emotional distress, and pain and suffering as a consequence of his or her application being rejected. Each of the plaintiffs also suffered humiliation, emotional distress, and pain and suffering upon learning that Defendants had discriminated against him or her on the basis of race.

47. As a result of Defendants' discrimination, Plaintiffs incurred educational and financial losses.

FIRST CLAIM

48. Plaintiffs repeat and reallege the allegations and averments of paragraphs 1-44 as if fully set forth herein.

49. The individual defendants acted under color of law to deny Plaintiffs and the class they represent equal protection of the laws, and to discriminate on the basis of race, in violation of 42 U.S.C. section 1981 and 1983.

50. The individual defendants violated the clear and well established Constitutional right of Plaintiffs and the class they represent to receive the same consideration for scholarships as applicants of other races.

SECOND CLAIM

51. Plaintiffs repeat and reallege the allegations and averments of paragraphs 1-47. As if fully set forth herein.

52. Defendant Alabama State University, as a recipient of federal funds, discriminated against Plaintiffs and the class they represent on the basis of their race, color, and/or ethnicity in violation of 42 U.S.C. section 2000d et seq.

RELIEF

WHEREFORE, Plaintiffs demand judgment:

A. Awarding them compensatory and punitive damages in an amount to be proven at trial;

B. Declaring that Defendants violated their rights to nondiscriminatory treatment under the Fourteenth Amendment and 42 U.S.C. §§ 1981. 1983 , and 2000d et seq.;

C. Enjoining Defendants from continuing to discriminate on the basis of race in violation of the Fourteenth Amendment;

D. Attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable authority; and

E. Any other relief that is appropriate and just.

Respectfully submitted.

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I hereby certify that a copy of the above and foregoing **Second Amended Complaint** has been served upon counsel for Defendant by placing same in the United States mail, properly addressed and postage prepaid, as follows:

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Supreme Court, U.S.
FILED
JUN 25 1999
CLERK

(2)

No. 98-1905

In The

Supreme Court of the United States

JESSIE TOMPKINS, et al.,

Petitioners,

v.

ALABAMA STATE UNIVERSITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT STATE OF ALABAMA

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11pp

QUESTIONS PRESENTED

1. Must a District Court permit an individual, who is a member of a certified class of plaintiffs in an ongoing desegregation action, to initiate a new and separate civil action against some of the defendants in the original action for the purpose of opposing the implementation of a portion of the final judgment rendered in favor of the plaintiff class in the original action?

2. Did the District Court for the Northern District of Alabama abuse its discretion by dismissing the complaint filed by the petitioners in this case (all of whom are members of the certified class of plaintiffs in *Knight v. State of Alabama*)?

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BRIEF IN OPPOSITION FOR RESPONDENT STATE OF ALABAMA

The State of Alabama ("the State"), one of the Respondents in the above-entitled action, respectfully requests this Honorable Court to deny the petition for writ of certiorari filed by the Petitioners Jessie Tompkins and others ("the Tompkins Plaintiffs"), in which they seek review of the decision of the Court of Appeals for the Eleventh Circuit affirming the opinion rendered in this case by the United States District Court for the Northern District of Alabama. The District Court's opinion is reported at 15 F.Supp.2d 1160 (N.D.Ala. 1998).

STATEMENT OF THE CASE

The State incorporates by reference the statement of facts in the opinion of the District Court below in *Tompkins v. Alabama State University*, 15 F.Supp.2d 1160 (N.D.Ala. 1998).

The decree rendered by the United States District Court for the Northern District of Alabama in *Knight v. State of Alabama*, 900 F.Supp. 272 (N.D.Ala. 1995) [herinafter cited as *Knight III*], is in no sense whatsoever a "consent decree"; rather, it is a remedial decree representing the judgment of the District Court entered against the defendants (including, among others, the State) in favor of the plaintiffs (including, among others, the Tompkins Plaintiffs). *See, Knight III*, 900 F.Supp. at 374.

Contrary to the implication of the Tompkins Plaintiffs' brief (Pet'rs.' Br. at i, 13-15), the District Court's decree in *Knight III* does not categorically exclude black

students from all participation in the Diversity Scholarship Program ordered by the Court for Alabama State University ("ASU"): "The most significant but not exclusive criteria [*sic*] in awarding scholarships under this Decree must be the diversification of the student bodies at Alabama State University and Alabama A & M University." *Knight III*, 900 F.Supp. at 357. Rather, the District Court excluded black students categorically in only one narrow area:

> The Court will specifically require, however, that the diversity scholarship criteria provide that any recipient whose award includes room and board, shall be of a race other than African-American. The Court believes that this narrow restriction on the availability of Court-ordered Diversity Scholarship assistance is required to aid the University in meeting its constitutional duty to desegregate and to ensure that the scholarship funds are applied to an appropriate use.

Knight, 900 F.Supp. at 382. This limited exclusion implies that a black student can be a recipient of an award that does not include room and board, i.e., an award covering only tuition, fees and books. Thus, although the manner in which ASU has implemented the Diversity Scholarship Program has precluded the participation of black students, the District Court's decree in *Knight III* categorically precludes black students from receiving diversity scholarships only when those scholarships include room and board.

Ignoring this distinction, the Tompkins Plaintiffs broadly oppose the implementation of the Diversity Scholarship Program at ASU and, to that end, are attacking

in this case the validity of that portion of the 1995 decree in *Knight III* that provided for that Program. However, the Tompkins Plaintiffs are already also pursuing the same claim in *Knight v. State of Alabama*, CV-83-M-1676-S. They have filed a motion to intervene in *Knight*; limited discovery has been conducted on the issue of the adequacy of representation of the Tompkins Plaintiffs in *Knight* by the named class representatives; and briefs have been filed with, and oral arguments heard by, the District Court on the matter of intervention by the Tompkins Plaintiffs.

REASONS FOR DENYING THE WRIT

I. The allegedly conflicting decisions are distinguishable on their facts.

The Tompkins Plaintiffs erroneously assert that the opinion of the District Court (and that of the Court of Appeals) "is a direct affront to this Court's decision in *Martin v. Wilks*." (Pet'rs.' Br. at 19.) *See, Martin v. Wilks*, 409 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989).

In *Tompkins*, the District Court followed controlling precedent established by the Court of Appeals for the Fifth Circuit in *Hines v. Rapides Parish School Board*, 479 F.2d 762 (CA5 1973), and confirmed by subsequent cases.[1] *Rivarde v. Missouri*, 930 F.2d 641 (CA8 1991); *Miller v. Board of Education*, 667 F.2d 946 (CA10 1982); *see also, Bradley v. Pinellas County School Board*, 961 F.2d 1554

[1] The Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (CA11 1981).

(CA11 1992); *Pate v. Dade County School Board*, 588 F.2d 501 (CA5 1979), *cert. denied*, 444 U.S. 835, 100 S.Ct. 67, 62 L.Ed.2d 44 (1979). In *Hines*, the plaintiffs sought to challenge in a separate lawsuit an active desegregation plan approved by the district court. *Hines*, 479 F.2d at 763. The district court, noting that the original plaintiffs were still active, dismissed the action and the Court of Appeals affirmed. *Id.* The appellate court held that the *Hines* plaintiffs who sought to challenge the desegregation plan would have to petition the district court to allow them to intervene in the original desegregation case. *Id.* at 765. "If the court determined that the issues these new plaintiffs sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the new group, it could deny intervention." *Id.* at 765.

Thus, *Hines* establishes that when a party seeks to challenge any aspect of a school desegregation case over which the district court has retained jurisdiction, the court may require that challenge to be accomplished (if at all) by means of intervention in the original desegregation case and not by means of an independent action. *Hines*, 479 F.2d at 763-65. The rationale for this rule is the desire to permit plaintiffs to present complaints regarding a desegregation plan "without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle." *Hines*, 479 F.2d at 765. Applying *Hines*, the District Court in this case dismissed the Tompkins Plaintiffs' complaint, stating they could seek to intervene in the ongoing case of *Knight v. State of Alabama*.

Nothing in *Hines* conflicts with, or has been even tacitly or implicitly overruled by, *Martin*. In *Martin*, white firefighters were first denied intervention into a Title VII suit filed by black individuals and the National Association for the Advancement of Colored People against the City of Birmingham, Alabama, and the Jefferson County Personnel Board; they subsequently brought an independent action seeking to attack collaterally the judgment in the Title VII suit in which they had never been parties. *Martin*, 490 U.S. at 761-69. The District Court dismissed the firefighters' independent lawsuit for the reason that the City and Board could not be liable for discriminating in accordance with the Court's decrees. *Id.* at 760-61. The Court of Appeals for the Eleventh Circuit reversed the District Court, and this Court affirmed the decision of the Court of Appeals. *Id.* at 761, 768-69.

This Court held that a person who is not a party to an action cannot, under the Federal Rules of Civil Procedure, be obligated to intervene (or to attempt to intervene) in that action; rather, the plaintiff is effectively required to join that person as a defendant. *Martin*, 490 U.S. at 761. A non-party – "a stranger to the proceedings" – has no duty to intervene, nor is he bound – i.e., his own rights are not concluded – by a judgment or decree in a lawsuit to which he is not a party. *Id.* at 761. Rather, "a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined." *Id.* at 763. This Court therefore concluded that the firefighters were entitled to bring an independent action to attack collaterally the judgment – entered in the form of a consent decree – in the Title VII suit. *Id.* at 761-69. Not to permit such a collateral attack by a non-party on a consent decree

would foreclose any avenue by which the non-party could represent his own rights or interests. *Id.* Nothing in *Martin* even remotely suggests, however, that a member of a plaintiff class has an affirmative right to file a new lawsuit for the purpose of objecting to a decree of the District Court rendered in favor of the very class of which he is a member.

Hines and *Martin* therefore clearly do not conflict; rather, they both support the same goal: permitting those whose interests were supposedly not represented in a matter to have their day in court. *Hines* states that, in an ongoing school desegregation case, intervention is the appropriate means for addressing a complaint arising out of the implementation of a desegregation order, whether raised by a party, such as an absent class member, or by a non-party. *Martin*, by contrast, states only that if a non-party, whose interests were clearly not represented in the original lawsuit, is summarily denied intervention, he should be able to attack a consent decree entered in the original lawsuit in an independent action. These principles are entirely compatible with each other. These two cases do not contradict each other.

The District Court in *Tompkins* simply followed applicable precedent. *Martin* is irrelevant to this case: The 1995 decree which the Tompkins Plaintiffs now seek to overturn is not a "consent decree." Unlike the firefighters in *Martin*, the Tompkins Plaintiffs are not non-parties to the *Knight* case; to the contrary, they are members of a certified class of plaintiffs in *Knight*. The original case, *Knight v. State of Alabama*, is a school desegregation case over which the District Court still retains jurisdiction. In dismissing their complaint, the District Court did not

thereby prevent the Tompkins Plaintiffs from asserting their interests. Indeed, the Tompkins Plaintiffs are currently attempting to intervene in *Knight v. State of Alabama*. There is therefore no reason for this Court to issue a writ of certiorari in this case.

II. There is no conflict between the opinions of the Courts of Appeals for the Tenth and Eleventh Circuits.

The Tompkins Plaintiffs assert that there exists a "split" between the Courts of Appeals for the Tenth and Eleventh Circuits on the issue of whether absent class members can collaterally attack an order in a school desegregation case. (Pet'rs.' Br. at 22.) The Tompkins Plaintiffs state that *Garcia v. Board of Education*, 573 F.2d 676 (CA10 1978), conflicts with the opinion of the District Court in this case. (Pet'rs.' Br. at 22.) In *Garcia*, the Court of Appeals held that principles of *res judicata* applied to bar absent class members from collaterally attacking the judgment in a school desegregation case, because the absent class members had been *adequately* represented in the original case. *Garcia*, 573 F.2d at 678-80. According to the Tompkins Plaintiffs, *Garcia* implies that if the absent class members could have shown *inadequate* representation, then the Court of Appeals would have allowed them to collaterally attack the judgment in the school desegregation case. (Pet'rs.' Br. at 22.)

However, four years later, the Court of Appeals for the Tenth Circuit foreclosed any such implication in *Miller v. Board of Education of Topeka*, 667 F.2d 946 (CA10 1981). Citing *Hines*, *Miller* held that, in order to challenge

the school board's compliance with *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), black students could be required to intervene in the existing, ongoing school desegregation case, rather than being allowed to bring an independent action. *Miller*, 667 F.2d at 947-48.

The Court of Appeals for the Tenth Circuit therefore is in agreement with the Court of Appeals for the Eleventh Circuit on the very issue presented by the petitioners for review. There is no "conflict between the Circuits" and therefore no reason to issue a writ of certiorari in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1905

(3)

In The
Supreme Court of the United States

JESSIE TOMPKINS; AUDRA BEASLEY; JAMES W. SCOTT; RODNEY SMITH,
Petitioners,

v.

ALABAMA STATE UNIVERSITY; ALABAMA STATE UNIVERSITY BOARD OF TRUSTEES; STATE OF ALABAMA; DR. WILLIAM HARRIS; DR. ROOSEVELT STEPTOE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF ALABAMA STATE UNIVERSITY RESPONDENTS IN OPPOSITION TO CERTIORARI

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1998

QUESTIONS PRESENTED

1. Where the petitioners filed a complaint seeking to challenge certain scholarships created by court order in a statewide desegregation case in which a certified class which included the petitioners had been a party, did the lower courts err in following the longstanding practice of dismissing this new complaint without ruling on the merits of any claims or defenses but with leave to petitioners to seek intervention in the desegregation case so that the challenge to the scholarships could be considered in the case where they had been ordered?

2. Where the above-described procedural order was entered without ruling on any claims or defenses, have the petitioners suffered any injury?

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BRIEF OF ALABAMA STATE UNIVERSITY RESPONDENTS IN OPPOSITION TO CERTIORARI

This Brief in Opposition to Certiorari is filed on behalf of four of the five respondents: Alabama State University, Alabama State University Board of Trustees, Dr. William Harris (who is President of Alabama State University), and Dr. Roosevelt Steptoe (who is Vice President for Academic Affairs of Alabama State University). The remaining respondent, the State of Alabama, is filing a separate brief.

JURISDICTION

This Court's jurisdiction is in doubt because the jurisdiction of the court of appeals was in doubt. Because the district court's order was in the nature of a docket management order which adjudicated no substantive or procedural rights, its order appears not to have been a final, appealable order. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996). If the court of appeals lacked jurisdiction, the case was not properly "in" the court of appeals, which is a prerequisite for this Court's jurisdiction under 28 U.S.C. § 1254. *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982).

STATEMENT OF THE CASE

Because the petitioners seek to relitigate portions of decrees in another case, *Knight v. Alabama*, it is appropriate to begin the Statement with a brief summary of *Knight*.

The *Knight* case

Knight v. Alabama was filed by the United States and by a class of plaintiffs including all black residents of

Alabama in the early 1980's, alleging a long history of massive racial discrimination and segregation in the public higher education system of Alabama, which had injured and continue to injure black students and prospective students. Significant aspects of this discrimination included the limited mission of Alabama State University (a historically black university), its limited degree of desegregation, and the negative perceptions of the school among many white people -- all of which contributed to further injuring black students who attend or might wish to attend Alabama State University.

After a six-month trial, the district court found massive violations, and ordered a comprehensive remedy. Among other things, the remedy mandated further desegregation of Alabama State University and included measures to assist in doing so. *Knight v. Alabama*, 787 F.Supp. 1030 (N.D.Ala.1991). The *Knight* plaintiffs, representing the class of black Alabamians, appealed seeking additional relief, and the court of appeals ordered the district court to consider specific relief for the limited missions of the historically black schools. 14 F.3d 1534 (11th Cir. 1994).

On remand, the district court conducted a three-month trial in which the parties addressed the limited mission issue as well as progress under the 1991 decree. The court found that Alabama State University's mission, which had been discriminatorily limited by the State, contributed to the school's difficulty in desegregating its student body. It also found that the 1991 order had achieved only limited success in attracting other-race students to this historically African-American school. 900 F.Supp. 272 (N.D.Ala. 1995).

Based on the meager results of the 1991 remedy, and evidence concerning the effectiveness of various remedies, the district court decreed a comprehensive set of inter-related remedies, including new academic programs at Alabama State University, new state-supported endowment funds, and

new state-funded desegregation or diversity scholarships to help attract non-African-American students to Alabama State University. The new scholarships were to be separately funded by the State and were thus in addition to, not in place of, existing scholarship funds already available to all students.

The desegregation scholarships, according to the *Knight* court, were specifically designed to attract other-race students to Alabama State University and to overcome negative perceptions held by many white people about the school. The court found that attracting a "critical mass" of other-race students would have these effects, 900 F.Supp. at 320, and, along with the institution of new, high demand academic programs and enhanced facilities, would likely achieve the goal and ultimately make the racial scholarships unnecessary. Without the desegregation scholarships, however, the *Knight cour*t found, the remedial goals would likely be unattainable, and the success of the new programs and other remedial measures would be undermined. *Id.*[1]

The *Knight* court retained jurisdiction over the remedy including the diversity scholarships, and that jurisdiction continues actively today.

---

[1] Before ordering creation of the scholarships, the *Knight* court received briefs from the parties concerning their constitutionality. The order creating the scholarships specified the violations which it had found and which could not be redressed by more modest measures, some of which had been tried and failed. 900 F.Supp. at 318-20. The order contained narrow tailoring provisions which, among other things, limited the scholarships to Alabama residents, limited each student's length of eligibility, and provided for periodic reporting and review to determine whether or when to modify or terminate the scholarships. 900 F.Supp. at 356-58.

The proceedings below

Petitioners are four black Alabama citizens who are or were students at Alabama State University. They filed a complaint alleging racial discrimination in their failure to receive or be considered for the diversity scholarships offered by Alabama State University.

Petitioners' challenge to the diversity scholarships was a direct attack on the *Knight* decree. Nevertheless, the initial complaint and two successive amended complaints did not identify the diversity scholarships as the product of Orders in the *Knight* case, and did not identify petitioners as members of the plaintiff class of all black citizens of Alabama which had been certified in *Knight*. Petitioners' complaint also did not refer to representation -- adequate or inadequate -- by their class representatives in *Knight*. Pet., p. G1.[2]

On respondents' motion, the district court dismissed the petitioners' complaint without prejudice to seeking to intervene in the *Knight* case. Pet., p. B1. The district court said it was not ruling on the merits of any claims or defenses, and that "all these issues remain to be litigated and resolved if and when the *Tompkins* plaintiffs move to intervene in the *Knight* litigation." Pet., p. B16.

The district court emphasized that its procedural dismissal would fully protect all the petitioners' due process rights. Their right to be heard would depend primarily on whether they were inadequately represented in *Knight* by the class representatives. This would be true whether in an intervention or in a collateral attack, so requiring petitioners to proceed by a motion to intervene would not change their burdens or the applicable legal rules. Pet., pp. B14-B15.

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[2] Petitioners filed their original complaint in the Middle District of Alabama, rather than the Northern District where the *Knight* case was pending. The Middle District transferred the case to the Northern District. C.A. No. 97-T-471-N (M.D.Ala. June 16, 1997).

The district court noted that the intervention procedure was a familiar one which had been followed in school desegregation cases by several circuit courts of appeal, and that this procedure allowed a challenge to a desegregation order to be considered as a whole rather than piecemeal, promoted judicial efficiency, and minimized conflicting judgments. Pet., pp. B8-B12.

Petitioners appealed, and the court of appeals affirmed per curiam. Pet., p. A1.

This petition followed.

SUMMARY OF ARGUMENT

The decision below does not conflict with any other circuit, and does not conflict with any decision of this Court.

There is no dispute that the Tompkins plaintiffs are members of the class that was certified in *Knight v. Alabama*, and that the *Tompkins* complaint is a collateral attack on the court order in *Knight*. The order below does not bar this collateral attack. Whether such an attack can be maintained has yet to be determined, and the question here is only what case it will be determined in.

Following longstanding precedent in several circuits, the district court held that such an attack should be presented by a motion to intervene in the ongoing *Knight* case. The district court's procedural dismissal of the *Tompkins* complaint did not affect the Tompkins plaintiffs' rights, because their right to proceed in an independent case -- which requires them to prove they were inadequately represented in *Knight* -- is no greater than their right to intervene in *Knight*.

While the Tompkins plaintiffs will not be injured by having to seek intervention in the *Knight* case, the *Knight* parties, including the class of black citizens of Alabama, will be injured if the Tompkins plaintiffs are allowed to try their claim in isolation as they wish to do, without regard to the *Knight* record that led to that court's creation of the

scholarships. Because the scholarships are part of an overall remedy to end discrimination and segregation, considering a challenge in isolation could unravel the remedy while ignoring its purpose.

Requiring a challenge like this to be made in the original desegregation case therefore insures that a court will not decide the case in a vacuum, and guards against conflicting judgments. The district court's order, affirmed by the court of appeals, reached that result without depriving the Tompkins plaintiffs of any substantive or procedural rights.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT

A. Consolidating desegregation proceedings in a single case is standard practice in the courts of appeals.

In ordering a procedural dismissal, the district court reviewed and followed a standard practice that has been in use in school desegregation cases for a quarter century and has been approved by at least five courts of appeals. Respondents are not aware of any court that has rejected the procedure.

The procedure was first adopted by the Fifth Circuit in *Hines v. Rapides Parish Sch. Bd*, 479 F.2d 762 (5th Cir. 1973). There, a court adopted a comprehensive, district-wide school desegregation plan and retained jurisdiction to protect its judgment and insure successful operation of the plan. Later other citizens who were dissatisfied with the desegregation plan's operation filed a new suit. The district court dismissed the new complaint, but on appeal the Fifth Circuit held there must be a way for citizens "to present their complaints about the school system which results from a

desegregation order without fostering a multiplicity of new lawsuits over the same complicated and emotional issues which have already once been fought out in an all too lengthy court battle." The solution was to allow the new litigants to seek to intervene in the prior action, which was still being actively supervised by the district court. 479 F.2d at 765.

Later cases uniformly followed and elaborated on this approach, not only in the Fifth and Eleventh Circuits, but in other circuits as well. *Davis v. Board of Sch. Comm.*, 517 F.2d 1044 (5th Cir. 1975); *Bradley v. Pinellas County Sch. Bd*, 961 F.2d 1554 (11th Cir. 1992); *Rivarde v. Missouri*, 930 F.2d 641 (8th Cir. 1991); *Spangler v. Pasadena City Bd of Educ.*, 552 F.2d 1326 (9th Cir. 1977); *Miller v. Board of Educ.*, 667 F.2d 946 (10th Cir. 1982).[3] The courts of appeals observed that by preventing duplication, the intervention rule not only saved needless effort but also avoided the risk of inconsistent judgments.

These cases have all made clear that the intervention procedure does not take away any substantive or procedural rights, *e.g., Davis*, 517 F.2d at 1049, such as the right to discovery and an evidentiary hearing before a ruling on the intervention petition. *Bradley, supra.* The district court in this case also pointed out that the plaintiffs would not lose any due process rights by having to seek to intervene in the *Knight* case, because the showing required to mount a collateral attack -- chiefly inadequate representation -- is the same in a collateral lawsuit as in a motion to intervene. Pet., pp. B14-B15.

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[3] *Garcia v. Board of Education*, 573 F.2d 676 (10th Cir. 1977), cited by petitioners, is not in conflict. That case found the would-be challengers had been adequately represented, and the court therefore had no occasion to consider what forum would have been proper if the challenge had been allowed. The later *Miller* case, cited in the text, states the law in the Tenth Circuit, approving the intervention rule.

The intervention procedure is particularly well-suited to school desegregation cases, which have always presented special problems of enforcement. For example, this Court's "all deliberate speed" rule, adopted in 1955, contemplated a period of judicial supervision before a school system would be unitary. And the courts have recognized the systemic nature of the wrongs and the necessary remedies, so that a school desegregation plan must be viewed as a whole in addition to being a resolution of individual violations.

The district court carefully studied the history of school desegregation litigation, and correctly applied it here after finding that doing so would not deprive plaintiffs of any rights.

B. This Court's cases are not to the contrary.

Petitioners assert that the procedural rule of *Hines v. Rapides Parish* violates *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Martin v. Wilks*. 490 U.S. 755 (1989). But *Hansberry*, which guarantees a forum to a class member who can show inadequate representation, does not guarantee the right to choose which forum. The *Hines v. Rapides Parish* line of cases is consistent with *Hansberry* because they both allow a litigant to proceed at least upon proof of inadequate representation. *Hansberry* does not support a general right of collateral attack.

Likewise, the judgment below is consistent with *Martin v. Wilks, supra*. In that case this Court rejected a doctrine called "impermissible collateral attack" insofar as some courts had required a *non-party* to intervene on pain of being bound by the judgment. The petitioners apparently believe that *Martin v. Wilks* now allows anyone to bring a collateral attack on anything, and bars any order requiring anyone to intervene.

But *Martin v. Wilks* does not change anything here because that case was about non-parties, and it specifically reaffirmed the binding effect of judgments on class

members. 490 U.S. at 762n.2. Here we are dealing with class members, who of course are still bound unless they were inadequately represented. And the issue of inadequate representation brings us back again to the intervention because the showing of inadequate representation is a prerequisite to the plaintiffs proceeding, no matter where they are. See *Ortiz v. Fiberboard Corp.*, No. 97-1704 (June 23, 1999).[4]

II. THE INTERVENTION RULE IS SUPPORTED BY SOUND PRINCIPLES DOCKET MANAGEMENT

Petitioners' plainly wish to try their case in a vacuum. This is best captured in a revealing passage at page 19 of the Petition for Certiorari, where they complain that the order below requires them to "wade into the morass" of the desegregation suit. With all due respect, the "morass" that petitioners so disparagingly dismiss is a two-decades-long battle to gain for black students an equal opportunity for higher education in Alabama. Petitioners may not value this effort or this goal, but they are not entitled to have the courts ignore the interests of the students in whose behalf the *Knight* case has been and is still being fought.

Requiring the Tompkins plaintiffs' concerns to be raised in the *Knight* case rather than a separate case is not a mere formality. The courts have identified several distinct purposes served by the intervention rule: avoiding duplication and waste of effort, avoiding inconsistent judgments, and protecting the interests of beneficiaries of the original judgment.

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[4] Moreover, in *Martin*, intervention was arguably no longer an option because challengers to the underlying decree had sought intervention in the original case and been denied. Accordingly, while *Martin* addresses the right to a day in court, the Court had no occasion there to address the "which court" question.

A. Avoiding duplication and waste of effort

Whether the *Tompkins* petitioners must seek intervention in *Knight,* or whether they are allowed to proceed in a new case, there are no short-cuts. In either event, they must squarely address the *Knight* case, including the record, findings, and relief. Thus, petitioners do not lose anything by having to proceed in *Knight*. The courts and the *Knight* parties, on the other hand, lose a great deal if they must litigate the validity of these scholarships anew. The parties and the court in *Knight* shouldered a heavy burden in developing a record and in fashioning relief scrupulously tied to that record. There is no magic slogan that allows the *Tompkins* petitioners to undo that relief without a corresponding effort.

B. Avoiding conflicting judgments.

The specter of conflicting judgments which has concerned lower courts is no small matter. If the petitioners are allowed to proceed in this case (to which the *Knight* class is not a party), and obtain judgment entitling them to apply for or receive diversity scholarships, that will plainly conflict with the judgment in *Knight*. What result then? Could the *Knight* plaintiffs or anyone else can simply return to the *Knight* court and obtain a new judgment, or file a new lawsuit that in turn supersedes or "trumps" the *Tompkins* judgment? This is not a question answered in *Martin v. Wilks*.

If for no other reason, avoidance of tit-for-tat litigation would be grounds enough to sustain the *Hines* procedure of keeping all challenges to desegregation plans in a single case

C. Protecting the interests of the *Knight* class.

Even more than simply avoiding the burden of relitigation, other parties in *Knight* have a critical interest in the relief obtained there. Both the United States and the *Knight* class (which includes the Tompkins petitioners) have fought for many years to gain effective relief to end segregation and racial discrimination. The relief of which the petitioners complain was designed to benefit all students in the *Knight* plaintiff class by promoting desegregation at the historically black schools and thus enhancing the educational opportunities of the students, mostly black students, who might choose to attend the historically black schools. If Tompkins attacks the relief, he attacks a building block in the structure of improving educational opportunities at the historically black schools.

The interest of the *Knight* class in full and effective relief would be undermined by litigating in a vacuum. For example, considering the diversity scholarships in isolation from the record that produced them would ignore the basic rule that the scope of any remedy is determined by the nature and extent of the violation. *E.g., Milliken v. Bradley*, 418 U.S. 717 (1974); *Dayton Bd of Educ. v. Brinkman*, 433 U.S. 406, 421 (1977). When the *Knight* court devised its remedies, it was mindful of this Court's mandate that a court has "not merely the power but the duty to enter a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). That rule, applied to higher education by *United States v. Fordice*, 505 U.S. 717 (1992), requires a judicial remedy to be evaluated by a careful examination of the record underlying the remedy -- which petitioners seek to avoid.

As another example, the specific relief which petitioners apparently seek -- making the diversity scholarships available to all students without regard to race --

would likely have the effect of eliminating the scholarships entirely, thus having a double effect of undermining the desegregation remedy *and* depriving black and white students at Alabama State University of scholarship funds. This is because the scholarships were created for the express purpose of desegregation, and a change in their nature would directly frustrate the desegregation goal, as the *Knight* court has found:

> These funds are to be used to achieve the diversification of the student bodies on the AAMU and ASU campuses. . . . The Court will not approve any scholarship criterion that does not maintain complete and total fidelity to the desegregation objective. These funds are not to be used to attract black students to the University. [Order of September 25, 1995, 900 F.Supp. at 382.][5]

In short, if the *Knight* remedy is to be threatened, the beneficiaries of that remedy are entitled to know that it will be done not by indirection, but instead with full awareness of all the antecedents and consequences.

Respondents do not say that the above considerations mean the Tompkins plaintiffs will be denied intervention in

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[5] Accordingly, a successful challenge to the desegregation scholarships would almost certainly *decrease* the amount of scholarship funds available to black students at Alabama State University. This is because a ruling against the constitutionality of the desegregation scholarships would leave Alabama State University with its original, unaugmented, amount of scholarship funds, to spread among both its black and its white students. Moreover, because of the University's efforts to attract more white students, and the requirement that those efforts intensify, the number of white students competing with black students for those original funds would have increased, thus cutting black students' scholarship funds more and more each year.

Knight,[6] or that they will lose on the merits if they are allowed to intervene. Those questions are not before this Court at this time.

What these considerations do mean is that there are no short-cuts. Alabama State University, other litigants and other citizens throughout the State of Alabama, including the *Knight* class and the United States, have worked too hard at the process of desegregation to have important building blocks in the remedy dismantled by one-dimensional litigation which ignores all that has gone before.

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[6] Petitioners complain that nearly a year has gone by since they did in fact petition to intervene in *Knight*. But that time has been spent on discovery and briefing, mainly the question of adequacy of representation, just as the time would have to be spent on these matters before a separate suit like this one could be allowed to proceed to the merits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

JESSIE TOMPKINS, *et al.*

Petitioners,

v.

ALABAMA STATE UNIVERSITY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Petitioners submit this short response to the briefs in opposition filed by the State of Alabama ("Ala. Br.") and the Alabama State University Respondents ("ASU Br.").

1. Respondents cannot quite agree on what the Second Amended Complaint (the "Complaint") challenges. The Alabama State University Respondents (the "ASU Respondents") insist the Complaint is a "direct attack on the Knight decree." ASU Br. 4. Alabama, on the other hands, correctly recognizes that petitioners are challenging a program of all-white scholarships that goes beyond anything the District Court in Knight authorized. Ala. Br. 2. (Alabama also asserts that the Tompkins plaintiffs are "[i]gnoring the distinction" (id.) between the Knight decree and the actual program implemented by ASU. It does not explain how the Tompkins plaintiffs are doing this.)

Alabama's concession raises the natural question: if the program being challenged goes beyond what the District Court in Knight authorized, why should the Tompkins plaintiffs be forced to litigate their complaint in Knight?

2. Alabama makes the following remarkable two-pronged argument: first, that Hines v. Rapides Parish School Bd., 479 F.2d 762 (5th Cir. 1973) stands for the proposition that even non-parties must intervene in ongoing school desegregation cases (Ala. Br. 6); and, second, that Hines and Martin v. Wilks, 490 U.S. 755 (1989) "do not conflict" (Ala. Br. 6). These twin assertions, of course, cannot withstand even a cursory reading of Martin. See Martin, 409 U.S. at 763 ("'The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger'" quoting Chase Nat'l Bank v. Norwalk, 291

U.S. 431, 441 (1934)); id. ("the drafters cast Rule 24, governing intervention, in permissive terms").

3. Echoing the District Court, both respondents (Alabama quite explicitly) insist that Martin is inapplicable because the Tompkins plaintiffs are parties to the Knight litigation. Ala. Br. 6 ("the Tompkins Plaintiffs are not non-parties to the Knight case; to the contrary, they are members of a certified class of plaintiffs in Knight"); ASU Br. 8 ("Martin v. Wilks does not change anything here because that case was about non-parties . . . Here we are dealing with class members . . . "). Neither respondent can say anything at all about the fact, emphasized in the Petition, that this Court in Martin specifically stated that an absent class member is "not a party" (Pet. 20-21, quoting Martin, 490 U.S. at 762 & n.2) -- and one can only suppose that they mostly wish this Court had not said it. See also Ortiz v. Fibreboard Corp., 1999 WL 412604, *15 (U.S. June 23, 1999) (quoting footnote 2 from Martin for the proposition that the relevant res judicata exception exists for one who is "not a party").

4. Also echoing the lower courts, the ASU Respondents repeatedly insist that the Tompkins plaintiffs cannot be prejudiced because "their right to proceed in an independent case" would "require[] them to prove they were inadequately represented in Knight." ASU Br. 5. See also ASU Br. 7. But this, of course, is exactly wrong. In an independent litigation, defendants have the burden of proving and pleading affirmative defenses, including res judicata. See Rule 8(c), Fed. R. Civ. P.; Gomez v. Toledo, 446 U.S. 635, 640 (1980). Accordingly, in an independent action it would be defendants who would be obliged to plead and prove that plaintiffs had been adequately represented in the Knight litigation.

5. Both respondents insist that there is no circuit split because the Tenth Circuit decision in Garcia v. Bd. Of Ed., School District No. 1, 573 F.2d 676 (10th Cir. 1978) was superceded or overruled or modified -- respondents do not say which -- in Miller v. Bd. of Ed., 667 F.2d 946 (10th Cir. 1982). (Miller makes no mention of Garcia at all.) In the petition, the Tompkins plaintiffs pointed out that Miller was just another pre-Martin "impermissible collateral attack" case (Pet. 21 n.10), and respondents say nothing at all to refute this. Thus, respondents have it exactly backwards. It is not Garcia that no longer states Tenth Circuit law; if anything, it is Miller that no longer states good law.

6. Lastly, it deserves mention that the policy reasons in the ASU Respondents' long discussion attempting to justify the decision of the courts below (see ASU Br.7, 9-13) sound precisely like the reasons used by the pre-Martin cases to uphold the "impermissible collateral attack" doctrine and rejected by the Court in Martin. See Pet. 20. Thus, even if the ASU Respondents were correct that it would be "efficient" for the Tompkins plaintiffs to wade into the morass of the Knight litigation -- and it is hard to believe that it would, since the Knight litigation covers a myriad of parties and ongoing remedies throughout Alabama that simply have nothing to do with the racially-exclusive scholarships that are at issue here -- it would not matter. Martin has rejected any rule that intervention is obligatory whenever it is "efficient."

The ASU Respondents complain that both the United States and the Knight plaintiffs (their nominal opponents in the Knight litigation) "have fought for many years to gain effective relief to end . . . racial discrimination." ASU Br. 11. But the fact that the plaintiffs in

Knight apparently believed that they could "end racial discrimination" by acceding to a whites-only scholarship only underscores the necessity for an independent litigation in which the Tompkins plaintiffs can focus upon this counterintuitive conclusion of theirs.

CONCLUSION

This Court should grant the petition.

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